

## Missouri Attorney General's Opinions - 1966

Opinion	Date	Topic	Summary
<a href="#">2-66</a>	Aug 16	TAXATION (MERCHANTS & MANUFACTURERS). MERCHANTS. MANUFACTURERS. COUNTY COURT. ERRONEOUS TAXES. BOARD OF EQUALIZATION. COUNTY BOARD OF EQUALIZATION. BANKRUPTCY.	Merchants and manufacturers tax valuation cannot be reduced after statements mailed out because of mistake in valuation. If assessment raised by Equalization Board and no notice given, increase void. County court can correct erroneous valuation under Section 137.270. Taxes may be collected from bankrupt and his bondsman. Collector given credit for uncollectible taxes by county court.
<a href="#">3-66</a>	Aug 16	TAXATION (MERCHANTS & MANUFACTURERS). MERCHANTS. MANUFACTURERS. COUNTY COURT. ERRONEOUS TAXES. BOARD OF EQUALIZATION. COUNTY BOARD OF EQUALIZATION. BANKRUPTCY.	Merchants and manufacturers tax valuation cannot be reduced after statements mailed out because of mistake in valuation. If assessment raised by Equalization Board and no notice given, increase void. County court can correct erroneous valuation under Section 137.270. Taxes may be collected from bankrupt and his bondsman. Collector given credit for uncollectible taxes by county court.
<a href="#">4-66</a>	Dec 9	COUNTY COURTS. SPECIAL ROAD DISTRICTS. MUNICIPALITIES. POLITICAL SUBDIVISIONS. CONTRACTS BETWEEN POLITICAL SUBDIVISIONS. COOPERATION BETWEEN POLITICAL SUBDIVISIONS.	Article VI, Section 16, Constitution of Missouri, and Section 70.220, RSMo 1959, authorizes county court and special road district to contract for maintenance of public road in special road district; but does not authorize such a contract between the county court and a private person for maintenance of a private road.
8-66			Withdrawn

<a href="#">10-66</a>	Mar 22		Opinion letter to Mr. James E. Schaffner
<a href="#">13-66</a>	Feb 4	FEES. RECORDER OF DEEDS.	<p>Money received by the recorder of deeds for making xerox copies of legal documents on file in his office must be reported as “fees” accountable in a second class county as prescribed by Section 59.230, Mo. Supp. 1963.</p> <p>Money received by the recorder of deeds for making credit search and selling lists of chattel mortgages to various banks and loan companies does not constitute funds recoverable by the county as “fees” accountable under Section 59.230, Mo. Supp. 1963, or as money collected under color of office.</p>
<a href="#">15-66</a>	Jan 27	CRIMINAL COSTS. INSANE PERSONS. CRIMINAL INSANE. MENTAL ILLNESS.	The reasonable expenses of “commitment” or “confinement” of an accused for observation in a State mental hospital pursuant to examination under Section 552.020, RSMo. Supp. 1965, or under Section 552.030, RSMo. Supp. 1965, relating respectively to fitness to proceed and mental disease or defect excluding responsibility in criminal proceedings, may be taxed as costs of prosecution under the provisions of Section 552.080, RSMo. Supp. 1965, Subsection 1(1).
<a href="#">16-66</a>	Feb 25	SCHOOLTEACHERS. PUBLIC SCHOOLS. SCHOOL DISTRICT EMPLOYEES. SCHOOLS. STATE REPRESENTATIVE. STATE SENATOR. CONFLICT OF INTEREST.	Article III, Section 12, Missouri Constitution 1945, prohibits teachers and other employees of a public school district from holding the office of State Senator or Representative.
<a href="#">18-66</a>	Feb 25	SCHOOLS AND SCHOOL DISTRICTS. STATE AID. TUITION.	(1) “Equalization quota” and “Second level equalization quota aid shall be paid to the school district wherein the assigned pupil resides as provided by Sections 163.031(1) and 163.033, RSMo. Supp. 1965; (2) “Flat grant” aid shall be paid to the school district where the assigned pupil attends school as provided by Section 163.031(3), RSMo. Supp. 1965; (3) In calculating tuition rate of an assigned pupil, the per pupil cost of maintaining the school attended should be reduced by the amount of “flat grant” aid per pupil, as provided by Section 167.131, RSMo. Supp. 1965.
<a href="#">19-66</a>	Mar 3	CONFLICT OF INTEREST. MAYORS. CITIES – THIRD CLASS. DEPOSITARIES.	<p>The Mayor of Third Class City who is President, Director and Stockholder of bank in which city funds are deposited violates Sec. 77.470 RSMo 1959. Section 105.490 RSMo Cum. Supp. 1965 is violated by said conflict of interest.</p> <p>A mayor of a third class city has no lawful authority to appoint a</p>



			<p>member of the board of trustees of a special road district formed under Sections 233.010 to 233.165 RSMo 1959, and an attempted appointment of such an officer is void.</p> <p>A mayor of a third class city who attempts to name himself to the office of member of the board of trustees of the city-owned hospital, is guilty of a violation of public policy and such attempted appointment is void.</p>
<a href="#">21-66</a>	Apr 8	CITY LIBRARIES. REAL ESTATE. OWNERSHIP. OWNERSHIP – SALE OF.	City council is unauthorized to convey real estate, legal title of which is in board of trustees of city library for use and benefit of library. When board of trustees of city library uses library tax funds to purchase real estate to be used for library purposes, deed of conveyance should be to board of trustees.
22-66			Withdrawn
<a href="#">23-66</a>	June 6		Opinion letter to the Honorable Arthur B. Cohn
26-66			Withdrawn
<a href="#">27-66</a>	Feb 2	TREASURER. PAYROLL WARRANT REGISTER. CHECKS.	(1) The proposals of the St. Louis County Auditor that the St. Louis County Treasurer (1) provide the Data Processing Department with a beginning check number and (2) that the Treasurer incorporate the records produced by another department into his register, would both violate the statutory duties of the Treasurer.
28-66			Withdrawn
<a href="#">29-66</a>	June 28	MOTOR VEHICLE SAFETY RESPONSIBILITY ACT. MOTOR VEHICLES. SAFETY RESPONSIBILITY UNIT.	The Missouri State Highway Patrol or any peace officer, at the direction of the Director of Revenue, may secure the possession of the registration of a jointly owned vehicle where an operating joint-owner of a motor vehicle has caused the suspension of registration of such motor vehicle through violation of provisions of the Safety Responsibility Law.
31-66			Withdrawn
33-66			Withdrawn
<a href="#">34-66</a>	Mar 17	ROADS AND STREETS. ROADS. STREETS. COUNTY COURTS.	Money apportioned to Cass County as provided by Article IV, Section 30 (a), Constitution of Missouri, may not be expended on roads or streets under the jurisdiction or control of Belton, Missouri.
<a href="#">35-66</a>	June 22		Opinion letter to the Honorable James E. Schaffner
<a href="#">40-66</a>	Nov 3	INSURANCE. INSURANCE AGENTS. LICENSES.	<p>1) Agents of companies holding certificates of authority from Division of Insurance must be licensed.</p> <p>2) Certain mutual insurance companies must procure certificates of</p>

		MUTUAL INSURANCE COMPANIES.	<p>authority and agents of such companies must be licensed.</p> <p>3) Certain mutual insurance companies need not procure certificates of authority and agents of such companies need not be licensed.</p> <p>4) There are no “grandfather” exemptions from examination requirements for licensing of agents of mutual companies who were unlicensed agents prior to effective date of Sections 375.012 through 375.028, Cum. Supp.</p>
<a href="#">42-66</a>	Feb 1		Opinion letter to Colonel E. I. Hockaday
43-66			Withdrawn
<a href="#">44-66</a>	June 16	MOTOR VEHICLES. FARM VEHICLES.	Farm tractors are required by Section 304.010 to be operated at a minimum speed of 40 miles per hour on interstate highways.
<a href="#">48-66</a>	Sept 22	UNIFORM COMMERCIAL CODE. SECRETARY OF STATE. RECORDER OF DEEDS. PUBLIC RECORDS.	Pursuant to the authority of Section 400.9-407, RSMo Cum. Supp. 1965, county recorder of deeds shall conduct lien searches when requested to do so by nonstandard forms even though the Secretary of State has approved Missouri Uniform Commercial Code Form UCC-11 for such use.
<a href="#">49-66</a>	Jan 12	SECRETARY OF STATE. UNIFORM COMMERCIAL CODE. PHOTOCOPIES. SIGNATURES. FILING.	Photocopies of a security agreement or financing statement containing the photocopied signatures of both parties is entitled to be filed of record providing it meets all the other requirements of the Code and the proper fee is tendered. The Secretary of State should accept all instruments for filing where the instrument meets the formal requirements of the Code and administratively reject those that do not meet the requirements of the Code.
50-66			Withdrawn
<a href="#">52-66</a>	Feb 1	MOTOR VEHICLES. TRUCKS. FREIGHT TRANSPORT MOTOR VEHICLES. HIGHWAY DEPARTMENT. DRIVEAWAY OPERATION.	<p>1. Freight transport motor vehicles are limited by Sec. 304.170 RS Cum Sup 1965 to the lengths herein explained.</p> <p>2. The combination of vehicles referred to in Fig. 6 is not a “driveaway operation”.</p> <p>3. The authority of the Highway Commission under Sec. 304.170 RS Cum Supp 1965 is limited to designating highways on which vehicles not to exceed 65 feet may operate.</p>
<a href="#">53-66</a>	Apr 20	CRIMINAL CODE. MILEAGE. SHERIFF. COUNTIES. EXTRADITION.	Sheriff’s mileage incurred in returning an escaped felon from without the state is not taxable as criminal costs to be paid by the state.
<a href="#">54-66</a>	Apr 27	SCHOOLS. ATTENDANCE	When vacancy exists, which will not be filled in office of county superintendent of schools of third class county, County Court of such

		OFFICER. SUPERINTENDENT OF PUBLIC WELFARE. THIRD CLASS COUNTIES.	county may, in its discretion, by following procedure of Section 205.850 RSMo 1959, appoint a county superintendent of public welfare, who shall assume all powers and duties of school attendance officer of said county.
<a href="#">56-66</a>	Jan 27	CRIMINAL COSTS. INSANE PERSONS. CRIMINAL INSANE. MENTAL ILLNESS.	A mental examination granted a defendant under the provisions of Section 552.030, RSMo. Supp. 1965, by a physician of his own choosing and subsequent to the examination of the physician appointed by the court, is an examination incurred on behalf of the defendant and neither such examination nor subsequent testimony in the case may be taxed as costs against the State.
<a href="#">57-66</a>	Jan 19	STATE REPRESENTATIVE. REAL PROPERTY APPRAISER. PROBATE COURT.	A state representative may serve as real property appraiser for the Probate Court in Jackson County, without violating any state statute or Article III, Section 12 of the Missouri Constitution.
<a href="#">61-66</a>	Feb 25	STEALING. LARCENY. EMBEZZLEMENT. LEASED PROPERTY. PERSONAL PROPERTY. CRIMINAL LAW.	Lessee of personal property is guilty of stealing personal property where, with the required specific intent, he fails to return the property at the time and place required by the lease.
<a href="#">63-66</a>	Aug 26	PRISONERS. CONSTITUTIONAL LAW. LEGISLATURE. CLAIMS.	A person erroneously convicted does not have a "legal claim" against the state and the legislature may not make a grant for his relief under our present Constitution. An amendment to the Constitution would be necessary to authorize passage of enabling laws to accomplish this.
<a href="#">64-66</a>	Dec 9	INSURANCE. TAXES. STATE.	Under 375.180 the tax on net premiums is imposed upon the agent and may be recovered through the premium charged from the state as purchaser of insurance. Under 375.190 the tax on net premiums is imposed upon the purchaser and may not be recovered from the state as purchaser of insurance.
<a href="#">65-66</a>	Jan 18		Opinion letter to the Honorable James Millan
<a href="#">66-66</a>	Jan 12	TAXATION. MERCHANTS TAX. MANUFACTURERS TAX.	County collectors are entitled to charge to and collect from persons paying merchants and manufacturers taxes that become delinquent January 1, 1966, and January 1 each year thereafter the two per cent commission allowed for the collection of delinquent and back taxes pursuant to Section 52.290 RSMo, in addition to the interest and penalties provided by Senate Bill No. 356, 73 <sup>rd</sup> General Assembly,

			Section 150.235 RSMo Cum. Supp. 1965.
<a href="#">68-66</a>	May 6	LABOR ORGANIZATION. NEGOTIATION. PUBLIC BODY. POLITICAL SUBDIVISION. CITIES. SCHOOLS & SCHOOL DISTRICTS. COLLECTIVE BARGAINING. STATE. STATE OFFICERS. STATE BOARDS AND COMMISSIONS.	1. A representative of a public body may in its discretion meet with a representative of employees and talk about problems of mutual interest. This does not include the right or power to engage in collective bargaining. 2. If an understanding is reached between representatives of the public body and representatives of the employees the understanding shall be reduced to writing, but does not constitute a contract, and shall be submitted to the public body for appropriate action. 3. Any public body has the right and power to discuss matters of mutual interest with its employees or their representatives.
<a href="#">69-66</a>	Feb 28	DRIVERS LICENSES. DRIVERS LICENSE SUSPENSION. DRIVING WHILE INTOXICATED. MOTOR VEHICLES.	The revocation of the operator's license of one who has refused to take a chemical breath test as provided in Sections 564.441 and 564.444, RSMo Supp., 1965, may not be rescinded except for those reasons set out in paragraph 2 of Section 564.444 and is not affected by a subsequent finding of not guilty of a charge of driving while intoxicated under Section 564.440, RSMo Supp., 1965.
<a href="#">70-66</a>	Mar 21		Opinion letter to the Honorable Thomas A. David
71-66			Withdrawn
<a href="#">72-66</a>	Mar 17	AUTOMOBILES. DRIVERS LICENSES. LICENSES. MOTOR VEHICLE EQUIPMENT. MOTOR VEHICLES.	A conviction for operating a motor vehicle without headlights or taillights or with no stop or brake lights or with defective or inadequate brakes is for a violation of a vehicle equipment provision and is excepted from the assessment of points under Section 302.302-1 (1).
<a href="#">74-66</a>	Mar 17	CITIES. INCORPORATION OF CITIES. COUNTIES, FIRST AND SECOND CLASS.	Section 72.085, RSMo Cum. Supp. 1965 provides an alternative method of incorporating cities in First and Second Class Counties having charter form of government.
<a href="#">75-66</a>	June 2	ARREST. CITIES, TOWNS AND VILLAGES.	A police officer of a third class city can make an arrest under authority of a warrant issued by such city at any place within the limits of the county within which the city is located.
<a href="#">76-66</a>	Mar 22	REGISTRATION OF VOTER.	A city clerk is not entitled to pay as deputy voter registration officer under Section 114.100, VAMS. The county clerk is required to furnish

		VOTER REGISTRATION. COUNTY CLERKS. CITY CLERKS.	three registration cards to absentee voter.
<a href="#">78-66</a>	May 4	COURTS. MAGISTRATE COURTS. CIRCUIT COURTS. CRIMINAL LAW. MISDEMEANORS. JURISDICTION. TRAFFIC REGULATION.	The Prosecuting Attorney may at his discretion file misdemeanor charges for traffic offenses in the circuit court, and may file a traffic ticket as the information, provided the traffic ticket complies with the requirements of law for informations.
<a href="#">79-66</a>	Mar 17	NON-TEACHER RETIREMENT. SCHOOLS. JUNIOR COLLEGES.	Employees of the junior college districts are not members of the Non-Teacher School Employee Retirement System (Sections 169.600 – 169.710, RSMo. Supp. 1965).
<a href="#">81-66</a>	Apr 8	INSURANCE. INSURANCE – CORPORATE NAME. CORPORATIONS. CORPORATIONS – NAME.	Foreign insurance company cannot be authorized to do business under name same as or similar to existing domestic or foreign insurance company.
<a href="#">84-66</a>	Oct 27	DRIVERS LICENSE. DRIVERS LICENSE REVOCATION. DRIVING WHILE INTOXICATED. MOTOR VEHICLES.	The only appeal from the revocation of a person's drivers license pursuant to Section 564.444, RSMo Cum. Supp., for refusing to submit to the chemical breath test provided thereon, is as provided by paragraph 2 of that section. In such appeal the burden is upon the state, acting through the local prosecuting attorney, to show by a preponderance of the evidence that: (1) The person was arrested; (2) The arresting officer had reasonable grounds to believe that the person was driving a motor vehicle while in an intoxicated condition; and (3) The person refused to submit to the test. If that burden of proof is sustained by the state, then the court should affirm the order of the Director of Revenue.
<a href="#">85-66</a>	Sept 22	HOSPITAL DISTRICTS. POLITICAL SUBDIVISION. FINANCIAL REPORTS.	A county hospital organized pursuant to Section 205.160 and related sections is a political subdivision of this state insofar as Section 105.145 RSMo Supp. 1965 is concerned and must cause to be prepared and filed an annual financial report pursuant to Section 105.145, RSMo. Cum. Supp. 1965.
<a href="#">87-66</a>	Mar 17	LOBBYIST. LOBBYING.	The representative of Christian Scientists who attempts to influence legislation is regulated by Section 105.470 RSMo Cum. Supp. 1965.

		LEGISLATION.	
<a href="#">88-66</a>	June 2	COUNTY OFFICERS. COUNTY BOARD OF EQUALIZATION.	Members of the county board of equalization appointed by the city council under the provisions of Section 138.015, RSMo 1959, are entitled to five dollars per day compensation by the county as provided for in Section 138.020, RSMo. Supp. 1965.
<a href="#">89-66</a>	Feb 16	COUNTY CLERKS. DEPUTY COUNTY CLERKS. DEPUTY COUNTY CLERKS, ALLOWANCE TO OFFICE FOR COMPENSATION.	The amount of money available to County Clerks in Third Class Counties under Section 51.450, RSMo Cum. Supp. 1965, for deputies and assistance does not have to be prorated but the entire amount may be used during the year 1965.
<a href="#">90-66</a>	Mar 21	DRAINAGE DISTRICTS. WARRANTS.	Warrants issued by a Circuit Court Drainage District organized under Chapter 242, RSMo 1959, are valid if provisions thereof are met.
<a href="#">91-66</a>	Aug 30	TAXATION. MILITARY PERSONNEL.	Non-resident military personnel who is or has personal property temporarily in this state does not owe personal property tax to the state.
<a href="#">92-66</a>	Aug 30	COUNTIES. COUNTY COURT. FRANCHISE.	The County of Jefferson cannot by ordinance grant to Jeffco Cablevision, Inc., a right or an exclusive right to operate for a certain period, a community antenna and cable system in Jefferson County.
<a href="#">95-66</a>	Feb 16	TAXATION. MILITARY PERSONNEL. COUNTY COLLECTOR.	Nonresident military personnel having personal property in Missouri can obtain a certificate of no tax due from the county collector. The collector, in the exercise of his discretion and judgment determines whether such military personnel is a bona fide nonresident within the purview of Section 301.025, RSMo 1959.
<a href="#">96-66</a>	Mar 3		Opinion letter to the Honorable Daniel V. O'Brien
<a href="#">97-66</a>	Feb 1		Opinion letter to the Honorable John C. Vaughn
<a href="#">98-66</a>	Mar 24	AUTOMOBILES. DRIVERS LICENSES. LICENSES. MOTOR VEHICLES. POINT SYSTEM. REVOCATION OF LICENSE.	Driving without a valid chauffeurs' or operators' license constitutes a "moving violation" as that term is used in Section 302.302-1(1), RSMo. Supp. 1965, and a conviction thereof requires an assessment of two points.
99-66			Withdrawn
<a href="#">100-66</a>	Jan 18	SCHOOLS. CONSTITUTIONAL LAW.	(1) School boards have the power to provide for the education of residents under five years of age. (2) Except as to those entitled to admittance as a matter of right, school boards have the power to

		COOPERATIVE AGREEMENTS. PREKINDERGARTEN. ECONOMIC OPPORTUNITY ACT. ELEMENTARY AND SECONDARY EDUCATION ACT.	regulate admittance ages. (3) As prescribed by Section 177.031, RSMo. Supp. 1965, school boards have the power to permit the free use of school buildings and facilities for prekindergarten programs. (4) School districts have the power to contract and cooperate with the Federal Government or its agencies or with a community action organization for the purpose of conducting prekindergarten programs under the Economic Opportunity Act and/or the Elementary and Secondary Education Act. (5) Article III, Section 38(a), Missouri Constitution 1945, authorizes school boards to receive Federal monies and to conduct prekindergarten programs as designated by the Federal Economic Opportunity Act and the Elementary and Secondary Education Act.
<a href="#">103-66</a>	Mar 17	LIBRARY DISTRICTS. CITY AND COUNTY. MERGER. EFFECTIVE DATE.	When a municipal library district becomes part of a county library district, pursuant to Section 182.030 RSMo 1959, beginning date of next fiscal year of the county library district following election in said municipal library district favoring merger, will be effective date of merger of such library districts.
<a href="#">104-66</a>	Mar 8	COUNTY COURTS. SPECIAL ROAD DISTRICT.	The County Court is not required to deliver road machinery to a special road district unless the territory was in a pre-existing road district.
<a href="#">110-66</a>	Apr 27	BLOOD SAMPLES. CORONERS. AUTOPSY.	Neither the Greene County Coroner nor members of the Highway Patrol have authority to withdraw a sample of blood from the body of an individual killed in an automobile accident when no inquest is held.
<a href="#">111-66</a>	Nov 15	INSURANCE. MUTUAL INSURANCE COMPANIES.	Farmers Mutual Insurance Companies may not be authorized by the Superintendent of Insurance to do an insurance business outside the State of Missouri.
<a href="#">115-66</a>	June 16	LIENS. MOTOR VEHICLES. MOTOR VEHICLE REGISTRATION.	When a new or used car is purchased in Missouri, a lien becomes perfected under Section 301.600, RSMo Supp. 1965, upon delivery to the Director of Revenue of either the existing title or manufacturer's certificate of origin and the new owner's application for title consisting of any one of the copies of Department of Revenue form number MMV-1-R2 along with the one dollar fee as required by Section 301.190, RSMo Supp. 1965. Payment of the Missouri Sales Tax is not necessary to perfect a lien.
<a href="#">117-66</a>	Jan 11		Opinion letter to Mr. G. L. Donahoe
<a href="#">118-66</a>	Feb 2	FINANCIAL STATEMENTS. WATER SUPPLY DISTRICTS.	A public water supply district, formed under the provisions of Section 247.010 to 247.220, required to file financial reports.
<a href="#">120-66</a>	Sept 8	DEPOSITS IN COURT.	The circuit clerk of a first class county has the discretionary power and

		CIRCUIT COURT. CIRCUIT CLERKS.	authority to invest funds deposited in the registry of the court in the manner provided for in Section 483.310, RSMo 1959, and to use the income derived therefrom as provided therein.
<a href="#">123-66</a>	Mar 28	NURSING HOMES. NURSING HOME DISTRICTS. COUNTY COURT. INDIGENTS.	1. Nursing home districts have no authority to accept and admit indigent persons to nursing homes without payment of fees. 2. The nursing home tax under Section 198.250, RSMo Cum. Supp., 1965 may be used for any of the purposes authorized by the nursing home law, Sections 198.200 to 198.350, RSMo Cum. Supp., 1965.
<a href="#">124-66</a>	Feb 16		Opinion letter to the Honorable Don E. Burrell
<a href="#">125-66</a>	Jan 18	CITY OF ST. LOUIS. REGISTRAR. COUNTY CLERK.	Sec. 51.150, RSMo Cum. Supp. 1965, applies to the City of St. Louis. The registrar of the City of St. Louis is authorized to perform the duties of County Clerk as provided by Sec. 51.150, supra.
<a href="#">127-66</a>	Mar 21	COUNTY AUDITOR.	The office of county auditor in Cape Girardeau County will not exist until January 1, 1967. The Governor may make an appointment after that date to fill the vacancy.
<a href="#">129-66</a>	June 22		Opinion letter to the Honorable Warren E. Hearnese
<a href="#">130-66</a>	Mar 22	JUVENILE OFFICERS. JUVENILE COURTS. COUNTIES.	The phrase, "engaged full time" as used in Section 211.393, RSMo. Supp. 1965, means that the juvenile officer, in order to qualify for the statutory contribution by the State of Missouri, may not hold another office or position and may not engage in any activity which would impair his ability to faithfully perform his duties as juvenile officer. Under this section it is only the juvenile officer who may qualify for the payments by the State of Missouri.
<a href="#">131-66</a>	May 26	COUNTY COURTS. CITIES, TOWNS AND VILLAGES. ROADS. STREETS.	A county court may expend monies from its Class 6 funds on streets of cities, towns and villages only when they are properly designated county roads and form a part of a continuous road or highway of said county leading into or through such city, town or village.
<a href="#">132-66</a>	Feb 16	LIQUORS.	It is unlawful under Section 311.070, RSMo 1959, for the Anheuser-Busch Employees Association to operate a package liquor store and a tavern for on-premise consumption for 5% beer and intoxicating liquor.
<a href="#">133-66</a>	Dec 6	PARKS. DAMS. RESERVOIR. COUNTY PARKS. COUNTIES. RECREATION	Clay County cannot spend its funds for the improvement of a reservoir located in Clinton County until such time as Clay County and Clinton County adopt a plan to cooperate under the authority of Sections 64.750 and 64.780 Cum. Supp. 1965, and said two counties may then properly develop the projects of their natural resources for the mutual benefit of the people of each county.



		GROUPDS.	
<a href="#">137-66</a>	May 23	COUNTY BOARDS OF EDUCATION. SCHOOLS. REAPPORTIONMENT.	1. Where county court district boundaries are changed by the county court a county board of education member who as a result of the changed boundaries no longer resides in the county court district from which he elected is not disqualified as a member of the board but may continue to serve until the expiration of his term. 2. At the next county board of education election subsequent to the change of county court district boundaries, the expiring positions should be filled by one member elected from each county court district as these districts exist at the time of the election.
138-66			Withdrawn
<a href="#">139-66</a>	Feb 25	SCHOOL BONDS. BOARD OF REGENTS. BOARD OF TRUSTEES. JUNIOR COLLEGES. SENIOR COLLEGES.	Under the current statutes, there have been two independent boards created to govern the Jasper County Junior College and if organized, the Missouri Southern State College at Joplin, Mo. Each Board has defined statutory duties. The Board of Trustees is the proper agency to call an election; and where approved by popular vote, to issue bonds, to sell the bonds as obligations of the Junior College District and to levy taxes pay the principal and interest thereon.
<a href="#">144-66</a>	Feb 16	ELECTIONS. VOTER REGISTRATION. RECORDS. COUNTY CLERKS.	Voter registration records consisting of pink, blue and white copies of registration sheets required to be kept by the county clerk pursuant to Sections 114.130 and 114.140, RSMo, shall be available for public inspection.
<a href="#">145-66</a>	Sept 15	INSURANCE. INSURANCE AGENTS. CORPORATIONS. LICENSES.	A corporation may not be a licensed insurance agent. Therefore, an insurance company cannot pay agent's commission to a corporate insurance agency.
146-66			Withdrawn
<a href="#">148-66</a>	Mar 8	COUNTY COURTS. CIRCUIT JUDGES. SALARIES.	With respect to judicial circuits comprising two or more counties, none of which is a county of the second class, unless the county courts of all such counties order an increase of the salary of the circuit judge, none of the counties may lawfully pay any salary in addition to the annual salary of \$16,000 payable by the state. No lesser or greater amount than \$3,000 can be paid to such judge by the counties composing such circuit.
150-66			Withdrawn
<a href="#">152-66</a>	Mar 28	ELECTIONS. ABSENTEE BALLOTS. COUNTY CLERKS.	With respect to the provisions of Section 112.060, RSMo 1959, in the event that the central committees of the dominant political parties submit lists of persons who are unable or unwilling to serve and are

			therefore less than double the number required by law the county clerk or the board of election commissioners may select persons of the proper political faith from outside the lists to make up double the number required and may appoint therefrom. In the event that all of the persons on the lists submitted by the central committees refuse to serve, the county clerk or the board may act as though the committee had failed to present a list of names as required and may, themselves, select and appoint the requisite number as required and provided by law for the party for the purpose of opening and counting the absentee vote.
<a href="#">154-66</a>	Aug 5		Opinion letter to the Honorable W. D. Hibler, Jr.
155-66			Withdrawn
157-66			Withdrawn
<a href="#">158-66</a>	Feb 3		Opinion letter to the Honorable James G. Lauderdale
<a href="#">159-66</a>	Mar 8		Opinion letter to the Honorable William H. Bruce
<a href="#">160-66</a>	July 1		Opinion letter to the Honorable Jack L. Duncan
<a href="#">163-66</a>	June 22		Opinion letter to Mr. Charles Claflin Allen
<a href="#">164-66</a>	June 2	SCHOOLS. TEACHERS. LICENSES. RELIGION. STATE BOARD OF EDUCATION.	(1) Where an applicant for a public schoolteacher certificate has the required amount of academic and professional preparation as required by Section 168.021, RSMo. Supp. 1965, and has presented evidence of good moral character as provided by Section 168.031, RSMo. Supp, 1965, the State Board of Education must issue a certificate; (2) The legislature in prescribing the requirements for certification as a public schoolteacher has not required that the applicant be presently employable, nor has it prohibited a cleric or religious from being certificated. The State Board of Education cannot lawfully add such as prerequisites in excess of those prescribed by statute; (3) Membership in the ordained clergy or in a religious order does not prevent a qualified person from being lawfully employed as a teacher of secular subjects in a public school; (4) An obligation to remit all or part of his salary to a religious organization or church does not prevent a qualified person from being lawfully employed as a public schoolteacher; (5) The teaching of religion as such in the public schools by any person is prohibited; (6) In the absence of a valid statute or judicial decree meeting requirements of due process of law, a qualified person cannot be excluded from employment as a public schoolteacher because he has taken a religious vow.
<a href="#">165-66</a>	Dec 6	INSURANCE.	Loss payable clause to mortgagee in policy insuring condominium

		CONDOMINIUMS.	property is ineffective. 448.120 requires proceeds of policy to be paid to manager or board of managers.
<a href="#">166-66</a>	May 3		Opinion letter to the Honorable Bob F. Griffin
167-66			Withdrawn
<a href="#">169-66</a>	Apr 20		Opinion letter to the Honorable Thomas A. David
<a href="#">172-66</a>	Mar 17	CHARITIES. CORPORATIONS. NOT FOR PROFIT CORPORATIONS. NURSING HOMES. PROPERTY TAX. PROPERTY TAX EXEMPTION. TAXATION- EXEMPTION.	The property of a private non-profit corporation organized to provide low rent housing for the aged is not exempt from real and personal property taxes under Section 137.100, RSMo, if the rentals exceed the operating and maintenance costs of the corporation.
<a href="#">173-66</a>	Oct 11	CHARITIES. SCHOLARSHIP FUND. SCHOOLS. STATUTORY CONSTRUCTION. TAXATION – EXEMPTIONS. TAXATION – SALES- USE TAX.	The phrase “supported by public funds or by religious organizations” as used in Section 144.040, RSMo, modifies only “educational institutions” and a religious, charitable or eleemosynary institution may be exempt from payment of sales and use taxes even though they are supported entirely by private funds. Thus the John J. Dwyer Funds, Inc., an organization incorporated to provide scholarships to worthy students using funds donated by private persons or firms, is exempt as a charitable organization from the payment of sales and use taxes under Section 144.040, RSMo.
<a href="#">174-66</a>	Feb 17		Opinion letter to Mr. Joseph Jaeger, Jr.
<a href="#">175-66</a>	Mar 2	ELECTIONS. PRECINCTS.	Election precincts in the City of St. Louis may be established according to the number of registered voters rather than the population of an area.
176-66			Withdrawn
<a href="#">177-66</a>	May 31	NEPOTISM. PUBLIC OFFICERS. SCHOOLS.	School director causing appointment of relative violates constitutional nepotism provision. Violator forfeits his office, but may not be prosecuted.
178-66			Withdrawn
179-66			Withdrawn
<a href="#">180-66</a>	Apr 14	SCHOOL DISTRICTS. CONSOLIDATION.	Sections 162.211(3) and 162.221 et seq., RSMo. Supp. 1965, are applicable to six-director school districts of St. Louis County, and 25 voters of such districts may petition for the establishment of a six-director district which combines adjacent districts.

<a href="#">181-66</a>	Feb 25		Opinion letter to the Honorable James L. Paul
<a href="#">183-66</a>	June 28	CORONERS. PROSECUTING ATTORNEYS. PHOTOGRAPHS. COUNTY BUDGET.	(1) The Coroner of a 3rd class county, a photographer, could not be paid out of county funds, as a coroner for photographs taken at the scene of a crime; (2) the Prosecuting Attorney is authorized to spend whatever is necessary in preparation of cases for trial subject to budget provisions of statutes.
<a href="#">184-66</a>	July 28	TAXATION. SERVICEMEN. PERSONAL PROPERTY. MILITARY SERVICE. RESIDENTS. NONRESIDENTS.	Nonresident servicemen stationed in Missouri are not liable for personal property taxes on personal property they bring with them. Resident servicemen are responsible for personal property taxes whether such tangible personal property is located in the state or out of state.
185-66			Withdrawn
<a href="#">186-66</a>	Feb 25		Opinion letter to the Honorable Haskell Holman
<a href="#">188-66</a>	July 28	LOTTERIES. CHAIN LETTERS.	A chain letter scheme whereby a person purchases a letter for ten dollars and can possibly receive a profit of \$320 if the chain is not broken is a lottery under Section 563.430, RSMo Supp. 1965.
<a href="#">189-66</a>	May 26	PEACE OFFICER. CONSERVATION AGENT. ASSAULT.	Within the context of Section 557.215, RSMo 1965 Cum. Supp., making it a felony to assault a "peace officer" while in the performance of his duties, the term "peace officer" includes agents of the conservation commission and deputy boat commissioners.
<a href="#">190-66</a>	Apr 20	COUNTY COURTS. CIRCUIT JUDGES. SALARIES. STATUTES.	Pursuant to Section 478.013, RSMo. Cum. Supp. 1965, (1) it is mandatory that the circuit judge or judges of a judicial circuit composed of two or more counties, one of which is a county of the second class, shall each receive \$3,000 payable by the counties composing the circuit, with each county contributing a proportionate part thereof, determined by the ratio that the population that each county bears to the population of the entire circuit; (2) the judge or judges of a circuit composed of or within a single county are not entitled to receive any greater annual compensation than \$19,000, including such part as may be paid by such county.
<a href="#">192-66</a>	Apr 27	HOSPITALS. HOSPITAL DISTRICTS. ELECTIONS. BONDS.	Hospital district pays election expense for election of members of hospital board and election for bond issue of district.
<a href="#">196-66</a>	Mar 28	NURSING HOMES. COUNTY MEMORIAL	County nursing homes, established under Chapter 205, are not eligible for matching state funds as provided in 184.290, because county

		HOSPITALS. MATCHING STATE FUNDS.	nursing homes cannot, by definition, be termed county memorial hospitals or additions thereto.
<a href="#">198-66</a>	Oct 11	CHARITIES. NURSING HOMES. STATUTORY CONSTRUCTION. TAXATION – EXEMPTIONS. TAXATION – SALES- USE TAX.	The Articles of Incorporation and by-laws of Kabul Nursing Homes, Inc., would permit its being considered a charitable institution and hence exempt from imposition of sales taxes under Section 144.040, RSMo, if, as matter of fact, the operation of the home is such as to entitle it to be a charitable institution.
<a href="#">199-66</a>	Mar 22	SURPLUS COMMODITIES PROGRAM. DIVISION OF WELFARE.	Carter County is entitled to reimbursement by the Division of Welfare for 50% of the sums expended by the county under the Surplus Agricultural Commodities Program, and that the fact the county may be reimbursed for part or all of the remaining 50% of the sums expended from Federal funds under the Economic Opportunity Act, does not abrogate their right to reimbursement by the Division of Welfare under Section 205.960, RSMo. Supp. 1965.
<a href="#">201-66</a>	Aug 30	COUNTY SUPERINTENDENTS. COUNTY BOARD OF EDUCATION. SCHOOLS.	Where the county superintendent is incapacitated or the office is vacant, then it is the duty of the county board of education, pursuant to Sect ion 162.161(6), RSMo Supp. 1965, to designate some person to perform the duties imposed by Section 168.051, RSMo Supp. 1965, on the office of county superintendent; and that all fees collected under Sect ion 168.051 are to be disposed of and accounted for as therein provided.
<a href="#">202-66</a>	Mar 17	FENCES. STATES. COUNTIES. STATUTES.	A farm owner cannot require the state or a county to share the cost of building fences pursuant to the fencing statutes.
<a href="#">204-66</a>	Mar 28	ELECTIONS – CONGRESSIONAL DISTRICTS. CONGRESSIONAL DISTRICTS – PRECINCTS. PRECINCTS – CONGRESSIONAL DISTRICTS.	Composition of Congressional Districts is determined by precincts existing on date designated by congressional districting statutes.
206-66			Withdrawn
<a href="#">207-66</a>	Mar 1		Opinion letter to Mr. Howard J. Turnbull

<a href="#">208-66</a>	Mar 1		Opinion letter to the Honorable G. Andy Runge
<a href="#">209-66</a>	Aug 15		Opinion letter to the Honorable Elva D. Mann
211-66			Withdrawn
<a href="#">213-66</a>	Apr 27	MOTOR VEHICLES. TRUCKS. TRAFFIC REGULATIONS. WEIGHT REGULATIONS.	Pursuant to Section 304.230, RSMo. Cum. Supp. 1965, on roads other than the federal interstate system of highways, a truck operator is permitted to shift the weight on an overloaded axle or axle group in such a way as not to overload any axle or axles without being charged with a violation, even though this be accomplished without removing or redistributing any part of the cargo on the truck; provided that an operator is guilty of a violation who thereafter intentionally shifts the weight in any manner so as to over load any axle or axles.
214-66			Withdrawn
<a href="#">216-66</a>	May 3		Opinion letter to the Honorable Charles H. Baker
<a href="#">218-66</a>	May 23	INITIATIVE. COUNTY COUNCIL. ST. LOUIS COUNTY CHARTER.	For the purpose of determining the sufficiency of initiative petitions under the St. Louis County Charter the petitions must be signed by at least 5 percent of the total vote cast for governor at the last election in at least 5 of the Council districts from which presently serving councilmen were elected.
<a href="#">224-66</a>	June 7	COUNTIES. COUNTY COURTS. PUBLIC ROADS.	The County Court of Washington County must comply with the method of letting contracts for the construction of roads, as provided in Section 229.050, RSMo 1959, when the estimated cost thereof exceeds the sum of \$500.
<a href="#">228-66</a>	Dec 9	SCHOOLS. ANNEXATION. ELECTIONS.	A school annexation election under Section 162.441 RSMo Supp. 1965, may be held within less than two years of a prior annexation election where the subsequent election involves a different proposal.
<a href="#">230-66</a>	Mar 29	COUNTIES. CITIES, TOWNS AND VILLAGES. COLLECTORS. COUNTY COLLECTOR. ST. LOUIS COUNTY.	St. Louis County, Missouri, has the power to contract with third and fourth class cities of that county to have the county collect city real and personal property taxes.
<a href="#">232-66</a>	Aug 11	LIQUOR.	A suspension of imposition of sentence after a finding of guilty is not a conviction within the meaning of the Liquor Control Law, Chapter 311, RSMo, and the Nonintoxicating Beer Law, Chapter 312, RSMo.
<a href="#">234-66</a>	Mar 29	PROSECUTING ATTORNEYS. COUNTIES. CHARTER COUNTIES.	The legislature may validly pass a statute requiring the Prosecuting Attorney of a Constitutional Charter County to devote full time to his duties.

		LEGISLATURE.	
<a href="#">236-66</a>	June 24		Opinion letter to Mr. Lowell McCuskey
<a href="#">237-66</a>	Mar 22	STATE REPRESENTATIVES. HOUSE OF REPRESENTATIVES. FILING. CANDIDATES.	Declarations of candidacy that have heretofore been filed with the Secretary of State for the Office of State Representative, prior to the filing by the House Apportionment Commission of its final report with the Secretary of State, are invalid.
<a href="#">239-66</a>	Apr 26	JUNIOR COLLEGE DISTRICTS. ADULT EDUCATION. SCHOOLS. COOPERATIVE AGREEMENTS. FEDERAL GOVERNMENT.	(1) A junior college district has the power to provide adult basic education for residents without regard to age; (2) Junior college districts are authorized to provide adult education gratuitously out of revenues derived by the school district from sources other than those described in Article IX, Section 3, of the State Constitution, and only with revenues which are not required for the establishing and maintaining of free public schools for persons between the ages of 6 and 20 years; (3) Junior college districts can contact and cooperate with the Federal Government and provide a local matching share in cash for adult basic education programs under the Economic Opportunity Act of 1964; (4) A junior college district may accept donations of money which are given to provide for the financing of an adult basic education program.
245-66			Withdrawn
<a href="#">247-66</a>	Sept 1	MERCHANTS. TAXATION. CONSIGNMENT.	Those dealers are liable for the merchants tax set out in Chapter 150, RSMo, upon goods stored in a warehouse pursuant to a consignment agreement between such dealers and the shippers of such goods, such agreement providing that the dealers have control of such goods and, whereunder such dealers may remove goods from the warehouse to be placed for sale by the dealers from time to time as needed.
<a href="#">249-66</a>	June 7	AIR CONSERVATION COMMISSION. MERIT SYSTEM.	1. The position of executive secretary to the Air Conservation Commission is a merit system employee. 2. The secretary of the executive secretary is a merit system employee. 3. All other employees of the Air Conservation Commission are merit system employees except those specifically exempted by Section 191.070, RSMo 1959. 4. The Air Conservation Commission has the power under Section 203.040(4), RSMo Cum. Supp. 1965, to fix the salary of the executive secretary, not to exceed twelve thousand dollars per annum.
<a href="#">251-66</a>	July 14	VOTING. MILITARY	Military Personnel, at Fort Leonard Wood who are qualified may register and vote in County where reservation is located, if they have

		PERSONNEL. NON-PAYMENT OF TAXES.	established residence in the State of Missouri. Non-payment of taxes cannot disqualify them.
<a href="#">252-66</a>	Nov 22	CHAUFFEURS LICENSE. MOTOR VEHICLE OPERATORS LICENSE. DECAL.	It is unlawful for any person to display or permit to be displayed, or to have in his possession any chauffeur's license or motor vehicle operator's license knowing the same to have been altered by the affixing thereto of a decal.
253-66			Withdrawn
<a href="#">257-66</a>	Apr 27		Opinion letter to the Honorable James L. Paul
<a href="#">260-66</a>	May 26	FIREARMS – CONCEALABLE. PERMIT TO OBTAIN.	Nonresident of this State may not acquire a permit to obtain firearms of a concealable nature.
261-66			Withdrawn
<a href="#">263-66</a>	Apr 6	COURTS. MOTOR VEHICLES. HARDSHIP DRIVING PRIVILEGES. ST. LOUIS COURT OF CRIMINAL CORRECTION.	The St. Louis Court of Criminal Correction has concurrent jurisdiction with the Circuit Courts of the City of St. Louis to hear applications and to grant hardship driving privileges under the terms and conditions specified in Section 302.309-3, RSMo. Supp. 1965.
<a href="#">269-66</a>	May 12		Opinion letter to the Honorable Jack J. Schramm
<a href="#">270-66</a>	Aug 16	WORKMEN'S COMPENSATION LAW. WORKMEN'S COMPENSATION, DIVISION OF. INDUSTRIAL COMMISSION. RECORDS.	Section 287.380 RSMo. Cum. Supp. permits the Division of Workmen's Compensation and the Industrial Commission to disclose records in their discretion to persons other than parties of the compensation proceedings.
<a href="#">272-66</a>	Apr 20		Opinion letter to the Honorable Robert Devoy
<a href="#">273-66</a>	Apr 27		Opinion letter to the Honorable David Thomas
<a href="#">274-66</a>	June 27		Opinion letter to the Honorable Ray V. Jeffrey
<a href="#">275-66</a>	June 16	HABITUAL CRIMINAL ACT. SENTENCE.	A hearing to determine if an accused is a second offender should be conducted by the court outside the presence of the jury at a time which will be least disruptive of the trial. Proof of prior convictions



		PUNISHMENT. SECOND OFFENDER. EVIDENCE.	may be in the form of authenticated copies of former judgments. Identification may be made through commitment papers. Punishment may be assessed by the court at any time after verdict if the accused is found to be a second offender, but sentence is not actually imposed until the judgment is rendered.
<a href="#">276-66</a>	Apr 29		Opinion letter to the Honorable Paul E. Williams
<a href="#">279-66</a>	July 27	NEPOTISM. PROBATE JUDGE. PROBATE COURT. INHERITANCE TAX APPRAISER.	The Nepotism provision of Article VII, Section 6, of the Constitution is not violated by the appointment by the Probate Judge of his father as Inheritance Tax Appraiser.
282-66			Withdrawn
285-66			Withdrawn
<a href="#">287-66</a>	Apr 20		Opinion letter to the Honorable Lem T. Jones
<a href="#">288-66</a>	June 28	PEACE OFFICERS. FIREARMS. WEAPONS. PROBATION AND PAROLE.	Probation and parole officers are exempt from the provisions of Sec. 564.610 RSMo Cum. Supp. 1965, relating to carrying concealed weapons.
<a href="#">289-66</a>	Oct 18	TRANSPORTATION OF BUILDINGS. OVER OR ACROSS PUBLIC HIGHWAYS. TELEPHONE WIRES TELEPHONE WIRES – RAISING.	Holder of permit to move building across or over public highway under Section 229.230 to 229.260 RSMo. 1959, unauthorized to require company with telephone wires along building transportation route to raise its wires to allow building to pass underneath. Telephone wires not “transmission lines” within meaning of sections, which sections are inapplicable to telephone wires. In its discretion, company may require cash deposit in advance from permit holder to cover expense of raising wires to allow building passage thereunder.
290-66			Withdrawn
<a href="#">294-66</a>	May 16	CONFLICT OF INTEREST. LEGISLATORS. GENERAL ASSEMBLY. SENATORS. REPRESENTATIVES.	1. The receipt by Representative F. E. Robinson, Knox County, of \$125.00 per month as executive Vice President of the Missouri Motel Association does not bring him within the purview of the State Conflict of Interest Law in that this amount of money does not constitute a substantial personal or private interest within the meaning of that law (2) A member of the General Assembly who has a substantial or private interest in any measure or bill proposed or pending before the General Assembly must file a written report of the nature of that interest before he passes on the measure or bill. (3) The Conflict of Interest Law, Section 105.460, RSMo Cum. Supp. 1965, applicable to members of the General Assembly does not prohibit a member of the General

			Assembly from voting on pending legislation even though he has a substantial personal or private interest in any pending legislation, if prior to his voting on that pending legislation he has filed a written report of the nature of his interest in that legislation with the Chief Clerk of the House or the Secretary of the Senate.
<a href="#">295-66</a>	July 26		Opinion letter to the Honorable Fielding Potashnick
<a href="#">298-66</a>	May 13	SCHOOLS. JUNIOR COLLEGE DISTRICTS. BONDS. STATE AUDITOR. REGISTRATION OF BONDS.	Bonds of Junior College District of Kansas City not required to be registered by state auditor.
<a href="#">300-66</a>	June 23	ELECTION. TIME. NOTICE. PUBLICATION.	The requirement of Section 120.390 RSMo, “to publish such notice for three consecutive weeks next prior to said primary” is satisfied by three separate insertions, one in each of three consecutive weeks, so that the last insertion occurs at the latest on the day next prior to the primary election, and at the earliest on the second Sunday next prior to the primary election.
<a href="#">307-66</a>	June 13		Opinion letter to the Honorable Carl D. Gum
309-66			Withdrawn
<a href="#">310-66</a>	May 20		Opinion letter to the Honorable Robert D. Scharz
311-66			Withdrawn
<a href="#">313-66</a>	July 5	COUNTY BOARDS OF EDUCATION. SCHOOLS.	There is no statutory method for breaking a deadlock in the election of president of the county board of education. Until the deadlock is resolved, the current president will continue in office pursuant to Section 105.010, RSMo 1959.
315-66			Withdrawn
<a href="#">316-66</a>	June 13		Opinion letter to the Honorable James W. Williams
<a href="#">318-66</a>	June 28	PERSONAL PROPERTY. TAXES. MILITARY PERSONNEL.	A Serviceman, resident of Missouri, although he may be outside the state on military orders is liable for taxes on tangible personal property located in Missouri on January 1 <sup>st</sup> of taxable year.
<a href="#">319-66</a>	June 15		Opinion letter to Mr. Vincent G. Baumann

<a href="#">320-66</a>	Nov 23	LIQUOR. CONSOLIDATION OF CITIES. CONSOLIDATION OF MUNICIPALITIES. CITIES, TOWNS AND VILLAGES.	If Oakland, a fourth class city under ten thousand population which has liquor by the drink, and Glendale, a fourth class city under ten thousand population which does not have liquor by the drink, consolidate under Sections 72.150 and 72.155, RSMo Supp. 1965, the new municipality will not have liquor by the drink and to have same will have to hold an election under Section 311.110, RSMo 1959, and related sections for liquor by the drink in the entire new municipality.
<a href="#">322-66</a>	Sept 20		Opinion letter to the Honorable Haskell Holman
<a href="#">323-66</a>	Aug 31		Opinion letter to the Honorable Henry C. Maddox
<a href="#">324-66</a>	June 15		Opinion letter to the Honorable Frank M. Karsten
<a href="#">326-66</a>	June 15		Opinion letter to the Honorable Eugene F. Mazzuca
<a href="#">327-66</a>	July 28	PREVAILING WAGE LAW. SOIL AND WATER CONSERVATION DISTRICTS. POLITICAL SUBDIVISIONS.	Soil and water conservation districts created pursuant to Section 278.060 et. seq. RSMo, Cum. Supp. 1965, are contemplated by and considered as "public bodies" under the provisions of Section 290.210 (6) Cum. Supp. 1965, and are subject to the provisions of the prevailing wage law.
328-66			Withdrawn
<a href="#">332-66</a>	Nov 3	DRIVERS LICENSE. DRIVERS LICENSE REVOCATION. DRIVING WHILE INTOXICATED. HARDSHIP DRIVING PRIVILEGES. MOTOR VEHICLES.	Upon proper showing, limited driving privileges may be granted pursuant to Section 302.309, RSMo Supp. 1965, to one whose license has been revoked for failure to submit to a chemical breath test as provided by Section 564.444, RSMo Supp. 1965.
<a href="#">337-66</a>	Nov 23	COMPATIBILITY OF OFFICES. CONFLICT OF INTEREST. OFFICERS. COUNTY CLERKS. COUNTY SUPERINTENDENTS OF SCHOOLS.	(1) There is no automatic forfeiture of office by an incumbent county superintendent of schools who assumes the additional but compatible office of county clerk, such officer is entitled to statutory compensation during the term of his office as county superintendent of schools. (2) The employees of such office are entitled to their regular compensation for services rendered during the term of office of their superior as county superintendent of schools.
<a href="#">339-66</a>	Dec 13	CORPORATIONS.	Any corporation offering engineering services to the public must do so

		ENGINEERS. PROFESSIONAL ENGINEERS.	through the medium of a registered professional engineer. A company or corporation may not use the word engineer in its name to indicate to the public that it may provide professional engineering services unless there is a registered professional engineer employed by the company. Violation of these rules constitutes a misdemeanor under Section 327.280, RSMo.
<a href="#">345-66</a>	July 1	PRIMARIES. POLLING PLACES. DAYLIGHT SAVING TIME. STANDARD TIME.	Rules for Opening and Closing Polls for August 2, 1966 Primary Election
346-66			Withdrawn
<a href="#">347-66</a>	Aug 30	STATE EMPLOYEES' RETIREMENT SYSTEM.	(1). Upon withdrawal or discharge from service of an employee, not a member of the General Assembly, who has served less than 15 years, such employee's accumulated contributions shall be retained by the Board of Trustees until the employee makes a written request for refund of his contributions. (2). The Board of Trustees has no authority to determine that such a withdrawn member's contributions shall be refunded, without a written request by the employee. (3). In the case of an employee, not a member of the General Assembly, who has served less than 15 years, upon his withdrawal or discharge from service, he ceases to be a "member" of the Retirement System without regard to whether he makes request for a refund of his contributions.
<a href="#">348-66</a>	Aug 26		Opinion letter to the Honorable Thomas C. Gilstrap
<a href="#">351-66</a>	Nov 1	RECORDS. STATE RECORDS COMMISSION. INSURANCE.	374.070 (3) authorizes Superintendent of Insurance to destroy specified records of all companies after five years. 374.070 (4) authorizes Superintendent of Insurance to destroy specified records of foreign and alien companies only after ten years. 374.070 (3) and (4) are repealed upon adoption of rules by state records commission.
<a href="#">356-66</a>	Sept 1	COUNTY CLERKS. FEES. SCHOOLS.	Section 165.087, RSMo 1959, was repealed by implication of the statutes placing the office of county clerk on a salary basis. This section was formally repealed by Senate Bill No. 3, 72nd General Assembly, Laws 1963, p. 200.
<a href="#">362-66</a>	July 26		Opinion letter to First Lt. Richard F. Whipple, USAF
<a href="#">364-66</a>	July 12		Opinion letter to the Honorable Gerald Kiser
<a href="#">366-66</a>	July 28	JUVENILE COURT.	A juvenile officer is not a police officer within the meaning of Section

		JUVENILE OFFICERS. MENTAL ILLNESS. MENTAL HOSPITALS.	202.803, RSMo 1959.
<a href="#">371-66</a>	Aug 30	PUBLIC ASSISTANCE. AID TO DEPENDENT CHILDREN.	Property owned by step-parent does not render child ineligible for aid to dependent children benefits.
<a href="#">372-66</a>	Sept 15	COUNTY CLERKS. LOCAL OPTION LAWS.	The following local option laws within the meaning of Section 51.135, RSMo Cum. Supp. 1965 should be reported by the County Clerk to the Revisor of Statutes: (1) Planning and Zoning, Class two and three counties, Sections 611.510-64.690, RSMo as amended (2) Township Organization, Sections 65.010-65.050, RSMo (3) Counties may join in performance of common functions or services, including purchase, construction and maintenance of hospitals, almshouse, etc., on vote of people, Sections 70.010-70.090, RSMo (4) Local Option County Registration, Chapter 114, RSMo as amended (5) Election to abolish or retain office of county superintendent of schools, Sections 179.210 - 179.220, RSMo Cum. Supp. 1965 (6) County Health Centers, Section 205.010, et seq, RSMo as amended (7) Eradication and control of Johnson Grass, Sections 263.255- 263.267, RSMo (8) Animals restrained from running at large, Chapter 270, RSMo (9) Fences and Enclosures, Sections 272.210-272.370, RSMo Cum. Supp. 1965 (10) Local Option Dog Tax, Sections 273.040 - 273.180, RSMo.
<a href="#">374-66</a>	Aug 30	PROBATE JUDGE. COUNTY COURT. BUDGET. BUDGETARY ESTIMATES. BUDGET LAW.	A probate judge may hire additional stenographers and clerks as needed and pay them salaries up to and including the amount of the preceding year's fees when such was included in the probate judge's budget.
376-66			Withdrawn
377-66			Withdrawn
<a href="#">378-66</a>	Nov 22	CHILDREN. DEPENDENTS. CHILD ABANDONMENT.	The putative father of an illegitimate child may be prosecuted for abandonment of the child under either Section 559.353 or Section 559.356, 1965 Cum. Supp., whether he has legal custody of the child or not.
381-66			Withdrawn
<a href="#">382-66</a>	July 5		Opinion letter to Mr. Robert C Lindstrom
385-66			Withdrawn
<a href="#">387-66</a>	Aug 11		Opinion letter to the Honorable Mark Scully
<a href="#">_____</a>			

<a href="#">388-66</a>	Oct 25	PREVAILING WAGES. CONSTRUCTION WORK. MAINTENANCE WORK. REPAINTING.	The repainting of bridges on State highways is “construction” within the meaning of, and therefore included in the operation of, the prevailing wage law, Sections 290.210 to 290.310, RSMo, as amended.
<a href="#">389-66</a>	Dec 1	CORONERS. FUNERAL DIRECTORS.	County coroner in counties other than St. Louis and first class counties has no authority to issue blanket instructions to funeral directors or undertakers not to embalm or otherwise mutilate a dead body until he is notified.
<a href="#">390-66</a>	Aug 11	LICENSES. DRIVERS LICENSE. BREATH TEST.	<p>The revocation of the operators license by the Director of Revenue of one who has refused to take a chemical breath test as provided in Sections 564.441 and 564.444 RSMo Cum. Supp. 1965, should not be rescinded by the court because the offender was subsequently charged with driving while intoxicated under a county or municipal ordinance rather than the state law.</p> <p>If a person refuses to take the test as provided in Section 564.441, RSMo Cum. Supp., the arresting officer should send a sworn statement to the Director of Revenue as provided in Section 564.444, RSMo Cum. Supp., regardless of what criminal charges are subsequently brought against the driver.</p>
<a href="#">391-66</a>	Nov 18		Opinion letter to the Honorable William W. Hoertel
<a href="#">393-66</a>	July 26		Opinion letter to Mr. James M. Byrne
<a href="#">394-66</a>	Aug 26		Opinion letter to Mr. Henry Maddox
<a href="#">395-66</a>	Aug 11		Opinion letter to the Honorable Don Witt
<a href="#">396-66</a>	Sept 22	SAFETY RESPONSIBILITY. DIRECTOR OF REVENUE. MOTOR VEHICLES. INSURANCE.	The Director of Revenue, under the provisions of Sections 303.090 and 303.100, RSMo, shall suspend the license and registration of a person who had a judgment rendered against him resulting from an automobile accident, even though this person had a proper liability insurance policy of the requisite amount at the time of the accident but was unable to satisfy the subsequent judgment resulting therefrom because of the failure of the insurance company to meet its obligations.
<a href="#">397-66</a>	Dec 9	INTEREST. TAXATION. TAXATION – DELINQUENT. TAXATION – OMITTED PROPERTY. PUBLIC UTILITIES.	Ad valorem taxes on utility property do not become delinquent and the Company subject to penalties provided for nonpayment of delinquent taxes authorized by Section 151.220, RSMo, until the thirty-first day of December next after the same are ascertained and levied. Taxes on such property are ascertained and levied by the local County Court in those counties in which the property is located as provided in Section 151.440, RSMo, only after the Court has received the certification of

		UTILITIES.	<p>the State Tax Commission and the local tax assessors as to the prorated assessed value placed upon the property subject to assessment.</p> <p>Since the tax on the disputed portion of the distributable property of Kansas City Power &amp; Light Co., and on a disputed addition to its local property subject to assessment in Jackson County in the year 1965, was not certified to the County Court until July, 1966, such taxes are not delinquent nor subject to penalty for nonpayment thereof until January 1, 1967.</p>
400-66			Withdrawn
<a href="#">403-66</a>	Sept 6		Opinion letter to the Honorable Melvin D. Benitz
<a href="#">404-66</a>	Aug 26		Opinion letter to the Honorable William J. Esely
<a href="#">406-66</a>	Aug 12		Opinion letter to the Honorable M. E. Morris
<a href="#">407-66</a>	Dec 8	GOVERNOR. COMPTROLLER. BUDGET. ALLOTMENTS. WORK PROGRAM. APPROPRIATIONS.	Interpretation of Sections 33.030 and 33.290, RSMo, respecting power of the Comptroller and Governor concerning expenditures and budgetary allotments.
<a href="#">412-66</a>	Oct 25	GENERAL ASSEMBLY. TEACHERS. SCHOOLS. STATE UNIVERSITY. JUNIOR COLLEGES.	Article III, Section 12, Missouri Constitution 1945, prohibits teachers and other employees of (1) a junior college operated by a public school district, (2) a junior college district, or (3) the state university from holding the office of state senator or representative.
<a href="#">415-66</a>	Oct 26		Opinion letter to the Honorable Thomas D. Graham
<a href="#">418-66</a>	Sept 20		Opinion letter to the Honorable James L. Paul
428-66			Withdrawn
<a href="#">429-66</a>	Nov 1	ARCHITECTS- REGISTRATION. RECIPROCAL REGISTRATION – ARCHITECTS. STATE BOARD OF ARCHITECTS AND PROFESSIONAL ENGINEERS. OUT-STATE REGISTRATION – ARCHITECTS.	A resident of Missouri or elsewhere may apply to State Board of Architects and Professional Engineers of Missouri for architectural registration upon proof he is a duly registered and qualified architect in good standing in other state, provided that other state has similar registration requirements and recognizes Missouri's registrations.

<a href="#">431-66</a>	Sept 15	CIGARETTE TAX.	"Bravo's" are cigarettes made from a substitute for tobacco and are subject to the cigarette tax imposed by Chapter 149, RSMo.
<a href="#">432-66</a>	Aug 22		Opinion letter to the Honorable James C. Kirkpatrick
<a href="#">434-66</a>	Aug 25		Opinion letter to the Honorable John W. Gardner
<a href="#">436-66</a>	Aug 30		Opinion letter to the Honorable James C. Kirkpatrick
<a href="#">437-66</a>	Dec 13	CITIZENSHIP- CITIZENS. LICENSES. PROFESSIONAL ENGINEERS. REGISTERED ENGINEERS. STATUTORY CONSTRUCTION.	Exchange or reciprocal registration may be granted to an applicant under Section 327.100, RSMo, if he meets the requirements set forth therein even if the applicant is not a citizen of the United States or Puerto Rico.
440-66			Withdrawn
<a href="#">446-66</a>	Aug 30		Opinion letter to the Honorable Philip V. Maher
449-66			Withdrawn
<a href="#">451-66</a>	Oct 18	PROXY VOTING. PUBLIC CORPORATIONS. POULTRY BOARD. BOARDS. PUBLIC BOARDS, ETC.	A member of the poultry board may not delegate or authorize another person to vote by proxy in his place but has a public duty to be present and vote in person in the interests of the public.
<a href="#">454-66</a>	Oct 21		Opinion letter to the Honorable Carl O. Brandwein
<a href="#">455-66</a>	Oct 18	SCHOOLS. SCHOOL BOARDS. ELECTIONS. NOMINATIONS. TIME.	Nomination of a school director by petition in certain urban school districts as provided in Section 162.491, RSMo Supp. 1965, may be filed at any date within a reasonable time prior to the election.
<a href="#">458-66</a>	Oct 17		Opinion letter to the Honorable Maurice B. Graham
<a href="#">462-66</a>	Sept 8		Opinion letter to Dr. L. M. Garner, M.D.
<a href="#">463-66</a>	Dec 13	TAXATION. TAXES. COUNTY COLLECTOR.	1) Surplus money received from the sale of real estate for taxes must, when demanded by the person entitled thereto, be paid immediately to such person. 2) The owner of real estate sold for taxes is not required to execute a deed to purchaser or any other person at any time.
<a href="#">464-66</a>	Sept 8		Opinion letter to the Honorable David W. Fitzgibbon



<a href="#">465-66</a>	Dec 29	CONFLICT OF INTEREST. SOIL AND WATER CONSERVATION DISTRICTS AND SUBDISTRICTS. SOIL CONSERVATION DISTRICT COMMISSION. SOIL CONSERVATION SUBDISTRICT.	The appointment of a member of the state soil and water districts commission, or a member of the board of supervisors of a soil and water conservation subdistrict, or a member of the trustees to the governing body of a subdistrict as the contracting officer for a soil and water conservation subdistrict is against public policy and void.
<a href="#">470-66</a>	Nov 1	COUNTY BUDGETS. SECTIONS 50.680 AND 50.710 REPEALED BY HOUSE BILL 205.	House Bill No. 205 enacted by the 73rd General Assembly expressly repeals Sections 50.680 and 50.710, RSMo 1959, as amended and re-enacted by Senate Bill No. 3 of the 73rd General Assembly effective January 1, 1967. The state auditor is required to develop or approve adequate budget forms for third and fourth class counties as required by Sections 50.525 to 50.745.
471-66			Withdrawn
<a href="#">473-66</a>	Oct 3	ASSESSMENT. REASSESSMENT. REEVALUATION OF REAL PROPERTY. BALLOTS.	The ballot proposition to be submitted to the voters under Section 137.037, RSMo Cum. Supp. 1965 requires that the dollars to pay for the cost of reevaluation of real property subject to taxation in the county should be expressed in specific figures.
<a href="#">478-66</a>	Dec 22	COUNTY HOSPITAL FUNDS. COUNTY HOSPITAL BOARD. COUNTY TREASURER.	A county hospital board may not invest public funds in bonds or other securities unless expressly authorized by statute.
<a href="#">483-66</a>	Sept 21		Opinion letter to Mr. John D. Paulus, Jr.
<a href="#">484-66</a>	Dec 1		Opinion letter to the Honorable E. H. Quigg
<a href="#">499-66</a>	Dec 8		Opinion letter to the Honorable Don Burrell
<a href="#">500-66</a>	Nov 3	ELECTION LAWS. ABSENTEE VOTING.	Chapter 112 on absentee balloting is mandatory in its application and limits absentee balloting to precise procedures spelled out in the statutes. An Elector wishing to vote must apply either in person or by mail for his ballot. An elector wishing to cast an absentee ballot must either return his ballot by mail or deliver it in person to the issuing officer.
<a href="#">502-66</a>	Dec 9	DRIVERS LICENSE.	The word "offense" used in subparagraphs (1), (2) and (3) of Section

		DRIVERS LICENSE REVOCATION. DRIVING WHILE INTOXICATED. MOTOR VEHICLES.	564.440, RSMo Supp. 1965, refer only to violations of this section, the state law, and does not include convictions for driving while intoxicated in violation of a county or municipal ordinance.
<a href="#">511-66</a>	Nov 21		Opinion letter to the Honorable Harry L. Porter
<a href="#">514-66</a>	Nov 23	INCOMPATIBILITY OF OFFICES. PROSECUTING ATTORNEY. PUBLIC ADMINISTRATOR.	The officers of the prosecuting attorney and the public administrator are incompatible.
<a href="#">517-66</a>	Dec 8		Opinion letter to Mr. Peter W. Salsich, Jr.
<a href="#">518-66</a>	Dec 6	QUALIFICATION OF VOTERS. VOTERS. CONVICTION OF FELONY. SENTENCES.	A voter, upon suspension of the imposition of a sentence, is not disqualified from registering and/or voting, if otherwise qualified.
<a href="#">522-66</a>	Dec 8		Opinion letter to the Honorable Donald L. Gann
<a href="#">526-66</a>	Dec 22	SHERIFFS. HIGHWAY PATROL. ARREST. BAIL.	(1) The sheriff under Supreme Court Rule 37.485 may admit to bail a person arrested for a motor vehicle violation pursuant to the bail schedule when the courts are not open. (2) The sheriff has a duty to receive into custody persons arrested without warrant by the Highway Patrol for a motor vehicle violation.
<a href="#">531-66</a>	Dec 9		Opinion letter to the Honorable Dewey L. Hankins
<a href="#">532-66</a>	Dec 8	COUNTY COURT. COUNTY COURT JUDGES. ELECTIONS. TIE VOTES.	(1) Section 49.040 RSMo 1959 is unconstitutional. (2) Section 111.760 is applicable to case where there is a tie vote for candidates for County Court Judge and a special election called.

TAXATION (MERCHANTS & MANUFACTURERS):

MERCHANTS:

MANUFACTURERS:

COUNTY COURT:

ERRONEOUS TAXES:

BOARD OF EQUALIZATION:

COUNTY BOARD OF EQUALIZATION:

BANKRUPTCY:

Merchants and manufacturers tax valuation cannot be reduced after statements mailed out because of mistake in valuation. If assessment raised by Equalization Board and no notice given, increase void. County court can correct erroneous valuation under Section 137.270. Taxes may be collected from bankrupt and his bondsman. Collector given credit for uncollectible taxes by county court.

August 16, 1966

OPINIONS NO. 2 and 3 (1966)

Honorable Don E. Burrell  
Prosecuting Attorney for Greene County  
Springfield, Missouri



Dear Mr. Burrell:

This is in response to your two requests for opinions concerning certain assessments of Merchants and Manufacturers Taxes which requests we have consolidated.

Your first question is as follows:

I.

"1. A new manufacturer in the County reported his total investment and inventory. Since he was assessed on April, 1963, and tax statements were not mailed until October 15, 1963, he has had no opportunity to appear before the Board to request an adjustment in his tax. This was reported on the prescribed assessment list and mailed into the Assessor in the regular and accepted manner."

Perhaps, some general statement of the applicable law is in order so as to make our answer to this question more understandable.

Under Section 150.310, RSMo 1959, manufacturers are required to pay a tax on the highest amount of inventory of raw materials and finished products as well as tools, machinery and appliances possessed by them between the first Monday in January and the first Monday in April. They are required to make a report of this amount to the assessor on the first Monday in May of each year who enters it in a tax book, Section 150.320, RSMo 1959.

Prior to the first Monday in May of each year, the assessor is required to inspect manufacturers facilities for the purpose of obtaining such information as is needed to accurately compare the facts with the manufacturers report, Section 150.325. A report of the assessor's findings is made to the county Board of Equalization and the tax book turned over to it on or before the second Monday of July.

Honorable Don E. Burrell

If, after comparing the assessor's reports and the manufacturer's statement, the county Board of Equalization raises the valuation of the statement, it must give notice to the person involved by mail and advise that the Board will meet on the second Monday in August to hear reasons why the increase should not be allowed, Section 150.330, RSMo 1959.

With respect to your questions set out above, you mention that the tax statement was not mailed until October 15, but you do not mention if the tax was based on the manufacturers own statement (in which case he has no cause to complain,) or if it was raised by the Board of Equalization in view of the assessor's report. The latter could only be done after giving notice as required by Section 150.330, supra, before the second Monday in August so that objections could be made on that date. Absent such notice, the increase is void, State v. Wilson, 332 SW 2d 867, 872.

Your second question is as follows:

## II.

"2. The Board erroneously put on the books an assessment on a merchant who had been in business in the County in prior years, but had removed his business from this County the latter part of 1962. He operated in another county during 1963 and paid his tax in said county. What procedure and under what authority do you strike this type of error from your tax books?"

There is no valid basis for the assessment of a merchant or manufacturer who was not doing business in Greene County during the year for which he was assessed. Section 137.270 RSMo is applicable in this situation. Such Section provides as follows:

"The county court of each county may hear and determine allegations of erroneous assessment, or mistakes or defects in descriptions of lands, at any term of the court before the taxes are paid, on application of any person who, by affidavit, shows good cause for not having attended the county board of equalization for the purpose of correcting the errors or defects or mistakes. If any lot of land or any portion thereof has been erroneously assessed twice for the same year, the county court shall release the owner or claimant thereof upon the payment of the proper taxes. Valuations placed on property by the assessor or the board of equalization shall not be deemed to be erroneous assessments under this section."

It is our view that Section 137.270, is applicable to all assessments of tangible property and is not applicable only to real estate assessments. Such Section provides for correction of erroneous assessments of all tangible property and correction of mistakes or defects in descriptions of lands.

It follows therefore, that the county court can correct an erroneous assessment of a merchant or manufacturer under Section 137.270.

### III.

"3. The assessed has filed bankruptcy and this office has filed proper papers to the referee. The assessed had proper bond filed with bondsmen qualified on the application for license. Do you hold the bondsmen liable for the tax?"

The federal bankruptcy act contains two provisions applicable here which are too lengthy to set out in view of the position we take upon this question.

Title 11, Section 35, U.S.C., sets out those debts which shall not be deemed affected by a discharge in bankruptcy. Among them are taxes levied by the United States, or any state, county, district, or municipality. Title 11, Section 34 U.S.C., provides that the liability of a surety for a bankrupt shall not be altered by discharge of such bankrupt.

There has been a large number of cases decided under these two sections involving myriad facets of the problem. Since you provide us with no information concerning the time the tax debtor filed his petition in bankruptcy with respect to the time his tax obligation matured (which may have something to do with the case,) we can do nothing more than to advise you that, in all likelihood, you should be permitted to proceed against the surety forthwith, the petition in bankruptcy notwithstanding. Before proceeding however, we recommend that you familiarize yourself with the cases set out under the foregoing federal statutes in the United States Code Annotated.

### IV.

"4. The assessed was a small operator and closed the business in the early part of the year and is not available for collection."

You do not state whether the individual was a merchant or a manufacturer. If he was a merchant Section 150.200 RSMo would be applicable. Such Section provides as follows:

Honorable Don E. Burrell

"The county court, at each regular term thereof, shall settle and adjust the accounts of the collector for licenses delivered to him giving him credit for all blank licenses returned, and charging him for all licenses not returned, according to the statement required to be filed by the person having license, and the statement of the bonds required to be returned; provided, however, that when the collector shows that he has exercised due diligence to collect outstanding merchants' taxes against the merchant and upon his bond or bondsmen and that the same is uncollectible, the county court, upon a showing of said facts may allow the collector credit for the amount thereof."

If the individual inquired about was a manufacturer, Section 150.200 would be applicable under the provision of Section 150.310, RSMo, which provides that manufacturers are taxed in the same manner as provided by law for the taxing and licensing of merchants.

It follows that if the collector shows that he has exercised due diligence to collect outstanding merchants' and manufacturers' taxes and they are uncollectible, the court may credit him for the amount thereof.

V.

"5. Is there any authority after tax statements have been mailed out to reduce the valuation returned for merchants' and manufacturers' tax when a greater amount than the actual value of the goods, wares and merchandise is actually turned in by the merchant or manufacturer."

We find no statute that authorizes such a change to be made after tax statements have been mailed. Such assessment may be incorrect because of the excessive valuation but it is not an erroneous assessment within the meaning of Section 137.270 RSMo, supra, which provides that valuations placed by the assessor or Board of Equalization are not erroneous assessments under such Section.

#### CONCLUSION

It is the opinion of this office:

1. Any increase in assessment for merchants' and manufacturers' taxes by a county board of equalization without notice is void.



Honorable Don E. Burrell

2. Assessments erroneously made of merchants' and manufacturers' taxes may be corrected by the county court under provisions of Section 137.270 RSMo.


3. A discharge in bankruptcy does not exonerate the bankrupt or his bondsmen from payment of merchants' and manufacturers' taxes already assessed.

4. If a collector shows that he has exercised due diligence to collect outstanding merchants' and manufacturers' taxes and such taxes are uncollectible, the county court may credit him for the amount thereof.

5. An excessive valuation by a merchant or manufacturer listed in his return for merchants' and manufacturers' tax cannot be corrected after tax statements based on such valuation have been mailed out.

The foregoing opinion which I hereby approve was prepared by my Assistant, Mr. C. B. Burns, Jr.

Very truly yours,



NORMAN H. ANDERSON  
Attorney General

TAXATION (MERCHANTS & MANUFACTURERS):

MERCHANTS:

MANUFACTURERS:

COUNTY COURT:

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August 16, 1966

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Honorable Don E. Burrell  
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Honorable Don E. Burrell

It is our view that Section 137.270, is applicable to all assessments of tangible property and is not applicable only to real estate assessments. Such Section provides for correction of erroneous assessments of all tangible property and correction of mistakes or defects in descriptions of lands.

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"3. The assessed has filed bankruptcy and this office has filed proper papers to the referee. The assessed had proper bond filed with bondsmen qualified on the application for license. Do you hold the bondsmen liable for the tax?"

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There has been a large number of cases decided under these two sections involving myriad facets of the problem. Since you provide us with no information concerning the time the tax debtor filed his petition in bankruptcy with respect to the time his tax obligation matured (which may have something to do with the case,) we can do nothing more than to advise you that, in all likelihood, you should be permitted to proceed against the surety forthwith, the petition in bankruptcy notwithstanding. Before proceeding however, we recommend that you familiarize yourself with the cases set out under the foregoing federal statutes in the United States Code Annotated.

### IV.

"4. The assessed was a small operator and closed the business in the early part of the year and is not available for collection."

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Honorable Don E. Burrell

"The county court, at each regular term thereof, shall settle and adjust the accounts of the collector for licenses delivered to him giving him credit for all blank licenses returned, and charging him for all licenses not returned, according to the statement required to be filed by the person having license, and the statement of the bonds required to be returned; provided, however, that when the collector shows that he has exercised due diligence to collect outstanding merchants' taxes against the merchant and upon his bond or bondsmen and that the same is uncollectible, the county court, upon a showing of said facts may allow the collector credit for the amount thereof."

If the individual inquired about was a manufacturer, Section 150.200 would be applicable under the provision of Section 150.310, RSMo, which provides that manufacturers are taxed in the same manner as provided by law for the taxing and licensing of merchants.

It follows that if the collector shows that he has exercised due diligence to collect outstanding merchants' and manufacturers' taxes and they are uncollectible, the court may credit him for the amount thereof.

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"5. Is there any authority after tax statements have been mailed out to reduce the valuation returned for merchants' and manufacturers' tax when a greater amount than the actual value of the goods, wares and merchandise is actually turned in by the merchant or manufacturer."

We find no statute that authorizes such a change to be made after tax statements have been mailed. Such assessment may be incorrect because of the excessive valuation but it is not an erroneous assessment within the meaning of Section 137.270 RSMo, supra, which provides that valuations placed by the assessor or Board of Equalization are not erroneous assessments under such Section.

#### CONCLUSION

It is the opinion of this office:

1. Any increase in assessment for merchants' and manufacturers' taxes by a county board of equalization without notice is void.

Honorable Don E. Burrell

2. Assessments erroneously made of merchants' and manufacturers' taxes may be corrected by the county court under provisions of Section 137.270 RSMo.


3. A discharge in bankruptcy does not exonerate the bankrupt or his bondsmen from payment of merchants' and manufacturers' taxes already assessed.

4. If a collector shows that he has exercised due diligence to collect outstanding merchants' and manufacturers' taxes and such taxes are uncollectible, the county court may credit him for the amount thereof.

5. An excessive valuation by a merchant or manufacturer listed in his return for merchants' and manufacturers' tax cannot be corrected after tax statements based on such valuation have been mailed out.

The foregoing opinion which I hereby approve was prepared by my Assistant, Mr. C. B. Burns, Jr.

Very truly yours,



NORMAN H. ANDERSON  
Attorney General

COUNTY COURTS:  
SPECIAL ROAD DISTRICTS:  
MUNICIPALITIES:  
POLITICAL SUBDIVISIONS:  
CONTRACTS BETWEEN POLITICAL  
SUBDIVISIONS:  
COOPERATION BETWEEN POLITICAL  
SUBDIVISIONS:

Article VI, Section 16, Constitution of Missouri, and Section 70.220, RSMo 1959, authorizes county court and special road district to contract for maintenance of public road in special road district; but does not authorize such a contract between the county court and a private person for maintenance of a private road.

OPINION NO. 4 (1966)  
OPINION NO. 51 (1965)

December 9, 1966

Honorable Wendell L. Evans, Jr.  
Prosecuting Attorney  
Laclede County  
Lebanon, Missouri



Dear Mr. Evans:

You have inquired of this office whether or not the opinion issued June 3, 1943, by the Attorney General to Honorable Oliver Rasch, is still valid. Such opinion held that the county court had no authority to rent road machinery to a township or other political or municipal subdivision or corporation, nor to individuals.

Because of constitutional and statutory changes since the 1943 opinion was issued, this office has withdrawn the 1943 opinion. The 1945 Constitution contained a provision directly applicable to the subject matter of the 1943 opinion. Article VI, Section 16, of the Missouri Constitution reads as follows:

"Co-operation by local governments with other governmental units.--Any municipality or political subdivision of this state may contract and cooperate with other municipalities or political subdivisions thereof, or with other states or their municipalities or political subdivisions, or with the United States, for the planning, development, construction, acquisition or operation of any public improvement or facility, or for a common service, in the manner provided by law."

Pursuant to this Constitutional provision the legislature passed Section 70.220, RSMo, which provides as follows:



Honorable Wendell L. Evans, Jr.

"Any municipality or political subdivision of this state, as herein defined, may contract and cooperate with any other municipality or political subdivision, or with an elective or appointive official thereof, or with a duly authorized agency of the United States, or of this state, or with other states or their municipalities or political subdivisions, or with any private person, firm, association or corporation, for the planning, development, construction, acquisition or operation of any public improvement or facility, or for a common service; provided, that the subject and purposes of any such contract or cooperative action made and entered into by such municipality or political subdivision shall be within the scope of the powers of such municipality or political subdivision. If such contract or cooperative action shall be entered into between a municipality or political subdivision and an elective or appointive official of another municipality or political subdivision, said contract or cooperative action must be approved by the governing body of the unit of government in which such elective or appointive official resides."

In your letter you stated there are two issues: (1) Does the County Court have power to lease a motor grader to a special road district or common district to be used on private roads of farmers and other residents of the road district? (2) Does the County Court have the power to directly use county road machinery and county employees to work on the private roads of residents of the road district for which the county will be compensated?

A limitation upon the power to contract is imposed by Section 70.220, supra, in that the object to be accomplished must be "a public improvement, facility or common service." The question is whether the term "common service" as contained in Section 70.220, RSMo 1959, actually means common public service. It is our view that the word "public" is necessarily implied.

Section 70.220, RSMo 1959, does mention contracting or cooperating with "any private person, firm association or corporation," but it seems clear that the statute does not envision the performance of some service on behalf of such private persons, but merely that they may be employed to assist in providing a public service.

Honorable Wendell L. Evans, Jr.

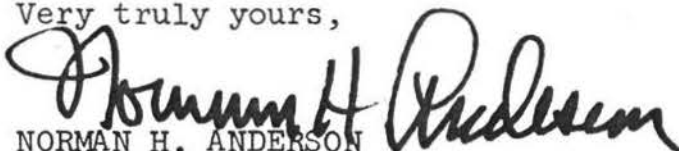
It is our view that the county court, acting for a county can contract with a special road district for maintenance of the public roads in such road district, but not for the maintenance of private roads of such district.

Therefore, the two issues presented in your opinion request must be answered in the negative since both questions involve the use of publicly owned equipment to render a nonpublic service, i.e., the care of a private road.

CONCLUSION

Article VI, Section 16, Constitution of Missouri, and Section 70.220, RSMo 1959, authorizes a county court and a special road district to contract with each other for maintenance of public roads located in the special road district by the county but do not authorize such a contract between private persons and a county court for maintenance of a private road.

Very truly yours,

  
NORMAN H. ANDERSON  
Attorney General

March 22, 1966



Mr. James E. Schaffner  
Acting State Purchasing Agent  
P. O. Box 539  
Jefferson City, Missouri

Dear Mr. Schaffner:

We have your letter requesting an opinion on the following subject:

"(1) Can any state department or institution request, require, or demand that the specifications as prepared by the state purchasing agent and director of printing indicate that a union label must appear on the finished printed piece and must the state purchasing agent and printing director comply with such request?

"(2) Can any state department or institution request, require, or demand that the specifications as prepared by the state purchasing agent and printing director indicate by NAME the union label that must appear on the finished printed piece, and must the state purchasing agent and director of printing comply with such request?

A reading of the statutes relating to the purchase of state printing clearly demonstrates that it was the intent of the legislature to grant sole discretion for the preparation of state printing specifications to the state purchasing agent; thus, Section 34.170, RSMo 1959, requires that the purchasing agent shall purchase all public printing and binding and that all state officers shall order all printing and binding through the purchasing agent.



Mr. James E. Schaffner

Section 34.180 provides, in part, that:

" \* \* \* The form, style, size and arrangement of type, the spacing of lines, the width of borders and margins, the kind of binding, the method and material of all public printing, when not otherwise prescribed by law, shall be determined by the state purchasing agent \* \* \*".

Section 34.200 states in part, that:

"The state purchasing agent shall prepare specifications for all printing to be contracted for and shall invite all bids and let all contracts upon such specifications which shall be a part of each contract and shall not be changed or modified after the contract is awarded. \* \* \*"

In the light of these statutory pronouncements, the conclusion is inescapable that the various agencies of the state may not demand or require that their printing be done in any particular manner or by any particular printer, but that they may only request these. The purchasing agent is then bound to exercise his discretion in determining how the work may best be done "having a proper regard for economy and workmanship and the purpose for which the work is needed," Section 34.180.

You have also inquired about the limits of your discretion in possibly limiting potential bidders on printing.

The question must be considered in the light of Section 34.210 which states that all public printing must be let by competitive bidding and the contract awarded to the lowest responsible bidder. This section goes on to state that:

" \* \* \* The purchasing agent shall exercise diligence in soliciting bids from all printing firms in the state that might reasonably be expected to be interested in bidding on any particular item and shall at all times endeavor to maximize competition among potential bidders. \* \* \* "

It appears from this provision of Section 34.210 that the purchasing agent should try to solicit bids from all printers who might be interested in bidding and see that the largest possible number of bidders compete for the printing.

On this subject former Attorney General Dalton in a letter dated March 15, 1956, to a former Purchasing Agent Edgar C. Nelson said:

Mr. James E. Schaffner

"Sections 34.200 and 34.210 RSMo 1949, provide that the State Purchasing Agent shall prepare specifications for State printing which shall be let to competitive bids in the manner specified in the latter section. After careful research we are unable to find any applicable statutes or court decisions of Missouri to the effect that State printing specifications shall include or omit the union label from State printing.

"Sections 34.200 and 34.210 prescribe the procedure that shall be followed in all such instances by the purchasing agent. The latter section provides the purchasing agent shall exercise due diligence in soliciting bids from printing firms reasonably believed or expected to be interested in bidding on any particular item and the purchasing agent 'shall at all times endeavor to maximize competition among potential bidders.'

"Section 34.210 does not set out the details or directions to be followed by the purchasing agent in carrying out the quoted portion of the section, and from the context of same it appears that a reasonable construction of the legislative intent is that the actual method employed in such instances would be within the discretion of the purchasing agent.

"It further appears that your inquiry involves a matter also falling within the discretion of the purchasing agent and one which is directly related to his efforts in attempting to maximize competition among bidders."

We believe this answers your inquiry.

Yours very truly,

NORMAN H. ANDERSON  
Attorney General

FEES: Money received by the recorder of deeds for  
RECORDER OF DEEDS: making xerox copies of legal documents on  
file in his office must be reported as "fees"  
accountable in a second class county as prescribed by Section  
59.230, Mo. Supp. 1963.

Money received by the recorder of deeds for making credit  
search and selling lists of chattel mortgages to various banks  
and loan companies does not constitute funds recoverable by the  
county as "fees" accountable under Section 59.230, Mo. Supp. 1963,  
or as money collected under color of office.

OPINION NO. 167 (1965)  
OPINION NO. 13 (1966)

February 4, 1966

Honorable Don E. Burrell  
Prosecuting Attorney  
Greene County  
Springfield, Missouri



Dear Mr. Burrell:

This is in answer to your request for an opinion of this  
office concerning certain funds collected by the recorder of  
deeds in Greene County, a county of the second class.

I

Your first question reads as follows:

"(1) Assume that the Recorder of Deeds  
charges money to attorneys and members of  
the general public, for making and deliv-  
ering uncertified photo-copies of legal  
documents on file in that office which  
are produced on the ZEROX copying machine  
which is owned by the county and operated  
by the employees whose wages are paid by  
the county, or out of funds which other-  
wise would accrue to the benefit of the  
county. Is this money, which is received  
by the Recorder of Deeds for these copies,  
money which should be reported as fees  
collected by his office and paid over to  
Greene County; or, is the Recorder of  
Deeds entitled to keep this money as com-  
pensation in addition to his salary as  
prescribed by law?"

Honorable Don E. Burrell

The duties to be performed by recorders of deeds for which they shall charge fees are listed in Section 59.310, RSMo 1959, together with the amount of the fees to be charged. Included therein is:

"For copying any recorded instrument, for every one hundred words . . . \$ .20."

In counties of the second class these fees may be retained by the recorder of deeds in an amount not in excess of \$5,000 for each year of his official term and all fees received by him in excess of this amount must be paid into the county treasury. Section 59.230 RSMo Supp. 1963.

In answer to your first question, it is our opinion that fees received by the recorder of deeds in Greene County for making Xerox copies of legal documents on file in his office must be reported as fees collected by his office and included in the fees which may be retained or paid over to the county in accordance with Section 59.230. Such fees may not be retained by the recorder as compensation in addition to that provided by this section.

In answer to your third question which reads as follows:

"(3) In the situation (1) above, would your opinion be different if the Recorder of Deeds purchased and paid for out of his own funds, the copy paper used in preparing the photo-copies."

It would make no difference if the recorder of deeds purchased and paid for out of his own funds the copy paper used in preparing the photo-copies. He is performing his duties required of him by statute and the fees he receives still must be reported and disposed of in accordance with Section 59.230, Mo. Supp. 1965.

## II

Your second question is as follows:

"(2) In the second situation, assume that the beginning of each week day, the Recorder of Deeds has his employees, whose wages are paid by the county or out of funds which otherwise would accrue to the benefit of the county, prepare a credit search of the chattel records on individuals requested by

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lending institutions, which chattel mortgages have been filed in the office of the Recorder of Deeds on the previous day, and supplies a list to various banks and loan companies in Greene County and in return receives a monthly payment from them for these lists. Is this money so received money which should be reported and paid over to the county; or, is the Recorder of Deeds entitled to keep this money as compensation in addition to his salary as prescribed by law."

In answer to this question we enclose an opinion written on August 4, 1953, to the Honorable Raymond H. Vogel, Prosecuting Attorney for Cape Girardeau County in which we held, among other things, that money received by a county recorder for the preparation, sale and distribution of chattel mortgage lists and lists of deeds of trust was not received for the performance of any statutory duty; was not obtained under color of office; and the county was not entitled to be reimbursed for such money on the theory either that these were fees which the recorder is required to account under Section 59.250, RSMo 1949 (third class counties) or under the theory that such money was collected under color of office. This conclusion was based in part upon the decision of the court in Yuma County v. Wisener, 46 P.2d 115. Later cases supporting this ruling are Webster County v. Nance, (Ky. 1962), 362 SW2d 723 and Nueces County v. Currington, et al, (Tex. 1941), 151 SW2d 648. See also 99 A.L.R. 642. However, we observe that this practice of conducting a private enterprise on county property and at county expense is questionable and should not be condoned.

#### CONCLUSION

Money received by the recorder of deeds for making Xerox copies of legal documents on file in his office must be reported as "fees" accountable in a second class county as prescribed by Section 59.230, Mo. Supp. 1963. This is true even though the recorder personally pays for the copy paper.


Money received by the recorder of deeds for making a credit search and selling lists of chattel mortgages to various banks and loan companies does not constitute funds

Honorable Don E. Burrell

which may be recovered by the county as "fees" accountable under Section 59.230 or as money collected under color of office.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John H. Denman.

Very truly yours,



NORMAN H. ANDERSON  
Attorney General

Enclosure:

Opinion to Vogel, 8-4-53



CRIMINAL COSTS: The reasonable expenses of "commitment" or  
INSANE PERSONS: "confinement" of an accused for observation  
CRIMINAL INSANE: in a State mental hospital pursuant to exam-  
MENTAL ILLNESS: ination under Section 552.020, RSMo. Supp. 1965,  
or under Section 552.030, RSMo. Supp. 1965, re-  
lating respectively to fitness to proceed and  
mental disease or defect excluding responsibility  
in criminal proceedings, may be taxed as costs  
of prosecution under the provisions of Section  
552.080, RSMo. Supp. 1965, Subsection 1(1).

Opinion No. 15 (1966)  
Opinion No. 205 (1965)

January 27, 1966

Dr. George A. Ulett, Director  
Division of Mental Diseases  
722 Jefferson Street  
Jefferson City, Missouri



Dear Dr. Ulett:

This is in response to your inquiry, which is as follows:

"I am advised that Attorney General's Opinion No. 13 (1965) relating to Chapter 552, R.S.Mo. Cum. Supp. 1963, entitled 'Mentally Ill Persons in Criminal Cases', is in some instances being interpreted as a conclusion that expense for commitments for observation and examination of indigent defendants may not be taxed as costs against the state or county and that the county of residence is liable for such expense only in the amount fixed by the Division of Mental Diseases for county patients.

"It would appear that the opinion does not so state and that the expense for observation and examination properly falls within Sections 552.020 and 552.030 R.S.Mo. Cum. Supp. 1963, as pursuant to and a necessary part of the order authorizing the examination and therefore may be taxed as costs and paid as other costs of prosecution."

Your question relates solely to the taxation of costs of commitment of accused persons in State hospitals pursuant to their examination to determine whether or not they have a mental disease or defect

Dr. Geo. A. Ulett

excluding fitness to proceed under Section 552.020, RSMo. Supp. 1965 and to the confinement in a hospital or other suitable facility to determine whether or not the person has a mental disease or defect excluding responsibility as provided in Section 552.030, RSMo. Supp. 1965.

The pertinent portion of Section 552.020, Subsection 2, states:

"Whenever there is reasonable cause to believe that the accused has a mental disease or defect excluding fitness to proceed the court, upon motion filed by the state or by or on behalf of the accused or upon its own motion, shall appoint one or more physicians to examine the accused and report upon the matter. The order shall specify the time, place, and conditions under which the examination shall be conducted, and may include provisions for the interview of witnesses or other physicians and for a commitment of the accused to a hospital or other suitable facility for such time and under such conditions as the court deems necessary for the purpose. \* \* \*"

Likewise, the related portion of Section 552.030, Subsection 4, states:

"Whenever the defendant has pleaded mental disease or defect excluding responsibility or has given the written notice provided in subsection 2, and such defense has not been accepted as therein provided, the court shall, after notice and upon motion of either the state or the defendant, appoint one or more physicians to examine and report upon the mental condition of the defendant. No physician shall be appointed unless he has consented to act. Examinations ordered hereunder shall be made at such time and place and under such conditions, including confinement to a hospital or other suitable facility and the interview of witnesses or other physicians, as the court deems proper. \* \* \*"

Section 552.080, RSMo. Supp. 1965, is entitled "Costs of procedures relating to persons in custody and having or suspected of having a mental disease, defect or illness." This section states:



Dr. Geo. A. Ulett

"1. Upon application the court in which proceedings are pending against an accused or in which a defendant was tried may at any time tax as costs in the case the following expenses, which in each case must be reasonable and so found by the court in an order taxing them:

(1) A fee for the examination and testimony of any physician appointed under Section 552.020 or 552.030 at the request either of the state or the accused or on the court's own motion;

(2) The expense of the care and treatment in a state mental institution of any accused or defendant transferred there under section 552.040 or 552.050.

"2. The costs taxed under subsection 1, of this section may be levied and collected under execution and the officer collecting the same shall pay to the physician or physicians mentioned above their fees so taxed and shall pay to the treasurer of the hospital mentioned above its expenses so taxed.

"3. The expense of conveying any accused or defendant from a correctional institution to a state mental hospital and the expense of returning him to a correctional institution shall be paid out of funds appropriated for the payment of criminal costs.

"4. The method of collecting the costs and expenses herein provided or otherwise incurred in connection with the custody, examination, trial, transportation or treatment of any person accused or convicted of any offense shall not be exclusive, and the expenses may be collected in any other manner provided by law."

Subsection 1(1), authorizes a fee for the examination and testimony of any physician appointed under Sections 552.020 or 552.030. The word "examination" is broad enough to include observation. Blackstone's New Gould Medical Dictionary, 2nd

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Edition (1956), at page 427, defines the word "examination" as "Investigation for the purpose of diagnosis." The same dictionary does not define "observation." This would infer, and logic would lead one to conclude, in a psychiatric sense that observation is a necessary part of examination.

Gould's Medical Dictionary, 2nd Edition (1928), page 491, defines "examination" as "Investigation, as for the purpose of diagnosis;" and at page 966, defines "observation" as "The examination of a thing; a systematic study of phenomena."

Webster's Third New International Dictionary (1963), at page 1558, defines "observation" as "the condition of one that is seen, examined or noticed."

Likewise, A Dictionary of English Synonyms and Synonymous or Parallel Expressions, Soule (1898), at page 152, under the term "examination" states, "1. Inspection, observation."

Hence there is reasonable ground to conclude that the observation of the accused is fundamentally part of the examination.

In our opinion dated January 29, 1965, to the Honorable Don E. Burrell we concluded that the "liability for costs includes the reasonable expenses of mental examinations ordered by the magistrate court and the circuit court and taxed as costs, but does not include the expenses, subsequent to such acquittal, incurred for the care and treatment of the accused in a state mental hospital, and[that] such hospital expenses may not be taxed against either the state or the county;". In that opinion the question of the expenses of hospitalization for observation, prior to a final determination of the case was neither raised nor considered.

It was no doubt intended that the reasonable expenses of hospitalization for observation under Section 552.020 or Section 552.030, be taxed as part of the "examination" when such "commitment" or "confinement" to a hospital is made by the order of the court under said sections and whether initially "at the request either of the state or the accused or on the court's own motion." Section 552.080, Subsection 1(1).

We recognize that the burden of payment of such costs may ultimately rest upon the State, the county or the accused, determined accordingly pursuant to the provisions of Chapter 550, relative to costs in criminal cases. In this respect we see no conflict with the conclusions of the Burrell opinion. The costs that we here consider are necessarily incurred prior to or in conjunction with the final determination of the case and may be deemed costs of prosecution.

Dr. Geo. A. Ulett

The prior laws relative to mental fitness or responsibility did not provide for confinement for examination. Section 202.863, RSMo., does provide the standard of liability for the care and treatment of the mentally ill on what might be considered a long-term basis but cannot be interpreted as creating a predetermined liability in an area involving the psychiatric evaluation of an accused. The extant liability for costs must be resolved in light of the language of Section 552.080, Subsection 1(1), and a determination of the legislative intent as evidenced by the provisions of Chapter 552.

It is noteworthy that the commitments or confinements under the sections in question need not be in a State hospital and that the Act merely envisions the utilization of some "suitable facility." This indicates that the broad scope of suitable facilities should be considered in interpreting these cost provisions. Likewise, the fact that such expenses may be incurred by and payable to a State institution does not permit us to distinguish or limit the taxation of expenses so incurred on the sole premise that the State itself, or the county, may be required to pay them.

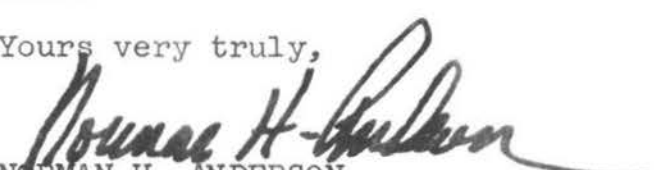
In passing, we note that the laws relative to the liability for expenses of persons confined in State mental institutions are inadequate, conflicting, and in some respects archaic. By comparison with other mental hygiene cost statutes Section 552.080 is new. Nevertheless, the provisions of that section are neither clear nor comprehensive and clarifying and additional legislation is desirable.

#### CONCLUSION

It is the opinion of this office that the reasonable expenses of "commitment" or "confinement" of an accused for observation in a State mental hospital pursuant to examination under Section 552.020, RSMo. Supp. 1965, or under Section 552.030, RSMo. Supp. 1965, relating respectively to fitness to proceed and mental disease or defect excluding responsibility in criminal proceedings, may be taxed as costs of prosecution under the provisions of Section 552.080, RSMo. Supp. 1965, Subsection 1(1).

The foregoing opinion, which I hereby approve, was prepared by my assistant, John C. Klaffenbach.

Yours very truly,

  
NORMAN H. ANDERSON  
Attorney General

SCHOOLTEACHERS:  
PUBLIC SCHOOLS:  
SCHOOL DISTRICT EMPLOYEES:  
SCHOOLS:  
STATE REPRESENTATIVE:  
STATE SENATOR:  
CONFLICT OF INTEREST:

Article III, Section 12, Missouri  
Constitution 1945, prohibits teachers  
and other employees of a public school  
district from holding the office of  
State Senator or Representative.

February 25, 1966

OPINION NO. 16 (1966)  
Opinion No. 214 (1965)

Honorable Marvin E. Proffer  
State Representative  
P. O. Box 191  
Jackson, Missouri 63755



Dear Representative Proffer:

This opinion is in response to your request that this office reconsider and withdraw its ruling in Opinion 365 to Frank L. Mickelson, issued September 9, 1963.

Opinion 365 construed Article III, Section 12, Missouri Constitution 1945, which provides:

"No person holding any lucrative office or employment under the United States, this state or any municipality thereof shall hold the office of senator or representative. When any senator or representative accepts any office or employment under the United States, this state or any municipality thereof, his office shall thereby be vacated and he shall thereafter perform no duty and receive no salary as senator or representative. During the term for which he was elected no senator or representative shall accept any appointive office or employment under this state which is created or the emoluments of which are increased during such term. This section shall not apply to members of the organized militia, of the reserve corps and of school boards, and notaries public."

Opinion 365 considered the same Constitutional provision and ruled that a teacher employed by a school district may not hold legislative office. This ruling was based primarily on the meaning of "municipality" used in the first sentence of Section 12, Article III above.



Honorable Marvin E. Proffer

The determining question is: Is teaching school an employment "under this state or any municipality thereof" within the meaning of Article III, Section 12?

An examination of legal encyclopediae and lexicons quickly reveals that school districts have been considered both to be municipalities and not to be municipalities in varying circumstances. 78 C.J.S., Schools and School Districts, § 25; 27A Words and Phrases, "Municipality", pp. 538 et seq.; Black's Law Dictionary, Fourth Edition, "Municipality," p. 1170.

Webster's dictionary defines municipality as a town, city or other district having powers of local self-government. The Supreme Court of Missouri, considering the term - its etymology and denotations - stated: "Municipality now has a broader meaning than 'city' or 'town' and presently includes bodies public or essentially governmental in character and function. . . ." St. Louis Housing Authority v. City of St. Louis, Mo., 239 S.W.2d 289, 294. The court held that the housing authority was a municipality within the provisions of Article VI, Section 16, Missouri Constitution 1945. The Supreme Court has considered school districts to be municipalities or municipal corporations in the following cases: Laret Investment Company v. Dickmann, 345 Mo. 449, 134 S.W.2d 65; Russell v. Frank, 348 Mo. 533, 154 S.W.2d 63, 67. Other cases holding that a school district is a municipal corporation are: Harrison v. Hartford Fire Ins. Company, 55 F. Supp. 241, Stroh v. Casner, 201 Ill. App. 281. The term "municipality" has also been held to include school districts. Seebee v. Board of Education of Clark County, 163 S.W. 472, 473; Joint School District v. Dabney (Okla), 260 P. 486.

A school district is clearly within the meaning of municipality as defined by the Supreme Court of Missouri.

This office has also considered school districts to be municipal corporations in ruling upon other official inquiries. Opinion 12 to Boyd issued 2-5-63; Opinion 284 to Gepford issued 10-14-63.

Often a generic term, because of frequent use in connection with a specific category within the genus, develops a specific as well as a generic meaning. The term "municipality" can include any local governing unit. However, the word also has a common specific usage; viz., as a synonym for city. This dual usage explains the apparent variance in legal authorities.

Under the St. Louis Housing Authority case, supra, school districts are within the meaning of "municipality" as used in Article III, Section 12. Even if there were ambiguity as to whether the generic or specific meaning of the term is used, this ambiguity is resolved by the further provisions of Section 12. Members of school boards are expressly excluded from the prohibition of Section 12. As we reasoned in Opinion No. 365, this express exclusion of boards of school districts indicated that other school district offices and employments are included

Honorable Marvin E. Proffer

within the term "municipality."

Turning now to the meaning of the phrase "employment under . . . , this state. . . ." Article IX, Section 1(a) of the Constitution provides:

"A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the general assembly shall establish and maintain free public schools for the gratuitous instruction of all persons in this state within ages not in excess of twenty-one years as prescribed by law. . . ."

While employees and teachers of public school districts are clearly not direct employees of the State yet are they "employees under the state" as used in Article III, Section 12, of the Constitution?

The Constitution has clearly imposed the duty upon the legislature to provide the widest possible dissemination of knowledge by requiring the establishment of free public schools. The legislative method chosen to do this has been the authorization of various types of local school districts.

The Supreme Court in *State v. Whittle*, 63 S.W.2d 100, 1.c. 102, said " \* \* \* 'Under the Constitution of 1875, the public schools have been entrenched as a part of the state government and it is thoroughly established that they are an arm of that government and perform a public or governmental function. . . .'"

We think that the language "employees under the state" is intended to have a somewhat broader meaning than "employees of the state." Because public schools are subject to such far-reaching controls, financial and otherwise, of the legislature and because by Constitutional mandate the legislature has responsibility for the establishment and maintenance of public schools, this language must be considered as applicable to employees of public schools, including teachers.

In *State ex rel Walker v. Bus*, 135 Mo. 325, the Court considered the provision of the Constitution of 1875 equivalent to Article III, Section 12, here considered. The court stated that, "Under this section all officers (except those under the United States) are divided into two classes, viz.: 'officers under the state' and officers 'under a municipality thereof.' \* \* \*"

Since the two divisions are all-encompassing we need not resolve here whether a schoolteacher is an employee under the State or under a municipality. In either case the prohibition of Section 12 applies.

Honorable Marvin E. Proffer


We fully appreciate the need for competent schoolteachers; especially in rural areas. Also, the qualities of a schoolteacher obviously make informed and dedicated legislators. The weighing of these benefits against the potential dangers of dual public employment is a matter of public policy which, in this case, has been resolved by the people through the adoption of Article III, Section 12, of their Constitution.

CONCLUSION

Therefore, it is the opinion of this office that Article III, Section 12, Missouri Constitution 1945, prohibits teachers and other employees of a public school district from holding the office of State Senator or Representative.

The foregoing opinion, which I hereby approve was prepared by my assistant, Louis C. DeFeo, Jr.

Yours very truly,

  
NORMAN H. ANDERSON  
Attorney General

SCHOOLS AND SCHOOL DISTRICTS: (1) "Equalization quota" and "Second level equalization quota" aid shall be paid to the school district wherein the assigned pupil resides as provided by Sections 163.031(1) and 163.033, RSMo. Supp. 1965; (2) "Flat grant" aid shall be paid to the school district where the assigned pupil attends school as provided by Section 163.031(3), RSMo. Supp. 1965; (3) In calculating tuition rate of an assigned pupil, the per pupil cost of maintaining the school attended should be reduced by the amount of "flat grant" aid per pupil, as provided by Section 167.131, RSMo. Supp. 1965.

February 25, 1966

OPINION NO. 18 (1966)  
Opinion No. 248 (1965)

Honorable Carl D. Gum  
Prosecuting Attorney  
Cass County Courthouse  
Harrisonville, Missouri



Dear Mr. Gum:

This opinion is issued in response to your request for an official ruling.

Your inquiry relates to the payment of State school aid where pupils have been assigned to a school district other than that in which they reside under Section 167.121, RSMo. Supp. 1965 (formerly Section 161.093, RSMo 1959). Your question is:

"Is it mandatory that the State Board of Education pay the required State Aid directly to the district in which the assigned student lives, or is it discretionary, so that said money may be paid directly to the district to which the student is assigned and eliminate the payment of tuition by the district of residence to the district in which the pupil is assigned?"

Section 167.121, RSMo. Supp. 1965, provides:

"If any pupil is so located that a school in another district is more accessible, the county superintendent shall assign the pupil to the other district."



Honorable Carl D. Gum

An assigned pupil is the concern of two school districts; he resides in one school district but attends school in another school district.

You refer to our previous opinion (No. 96, Whitlow, 4-7-54). Opinion No. 96 concludes that pupils assigned under Section 161.093 (then numbered Section 165.253) "shall be credited to the district in which they live for the purpose of apportionment of state funds, even though that district fails to pay tuition to the receiving school."

Section 161.093, RSMo 1959, provided in part,

"The attendance of such assigned pupil shall be credited for the purpose of apportionment of state funds to the district in which the student lives, and the board of directors of the district in which said student lives shall pay the tuition of such pupil or pupils so assigned."

(The quoted provision is omitted from Section 167.121, RSMo. Supp. 1965, which replaced Section 161.093 as of July 1, 1965.)

Opinion No. 96 does not answer your present inquiry because that opinion resolved which district should receive credit for an assigned pupil in the apportionment of State aid, whereas the present inquiry is to which district shall the State aid be paid. There is a distinction.

This distinction must be distilled from several statutes read together.

Two types of State aid are calculated on the basis of pupil attendance. These are commonly called "flat grant" and "equalization quota."

"Equalization quota" is provided for by Section 163.031(1), RSMo. Supp. 1965. After prescribing the method for calculating the "equalization quota," the subsection provides:

"The difference thus obtained shall constitute the equalization quota for the district. In computing the equalization quota the district is entitled to count for resident attendance all resident children attending another public school and whose tuition the district is required to pay."

Honorable Carl D. Gum

Thus "equalization quota" aid is both credited to and paid to the district wherein an assigned pupil resides. "Second level equalization quota" is also distributed in this manner. See Section 163.033, RSMo. Supp. 1965.

Section 163.031(3), RSMo. Supp. 1965, provides for "flat grant aid," to wit:

"In addition to the amounts allocated under subsections 1 and 2, an additional amount shall be granted each district which shall be computed by adding the average daily attendance of pupils residing and attending school in the district to the average daily attendance of nonresident pupils whose tuition the district of residence is required to pay."

Thus "flat grant" aid is paid to the school district which an assigned pupil attends. Assigned pupils are included in the phrase, "nonresident pupils whose tuition the district of residence is required to pay."

Although "flat grant" aid is paid to the district which an assigned pupil attends, the district in which the assigned pupil resides receives credit for "flat grant" aid as provided by Section 167.131(2), RSMo. Supp. 1965, which states:

"The rate of tuition to be charged by the district attended and paid by the sending district is the per pupil cost of maintaining the high school attended, less a deduction of the additional amount of state aid per pupil granted to the district maintaining the high school, as provided in subsection 3 of section 163.031, RSMo."

Section 167.131, supra, mentions only high school pupils, however, it is the general practice, as recommended by the State Department of Education, that elementary tuition be calculated in the same manner.

#### CONCLUSION

Therefore, it is the opinion of this office that as to State aid based upon pupils assigned to another school district under authority of Section 167.121, RSMo. Supp. 1965:

General Anderson


1.) "Equalization quota" and "Second level equalization quota" aid shall be paid to the school district wherein the assigned pupil resides as provided by Sections 163.031(1), and 163.033, RSMo. Supp. 1965;

2.) "Flat grant" aid shall be paid to the school district where the assigned pupil attends school as provided by Section 163.031(3), RSMo. Supp. 1965;

3.) In calculating tuition rate of an assigned pupil, the per pupil cost of maintaining the school attended should be reduced by the amount of "flat grant" aid per pupil, as provided by Section 167.131, RSMo. Supp. 1965.

The foregoing opinion which I hereby approve was prepared by my assistant, Louis C. DeFeo, Jr.

Yours very truly,

  
NORMAN H. ANDERSON  
Attorney General

CONFLICT OF INTEREST:  
MAYORS:  
CITIES - THIRD CLASS:  
DEPOSITARIES:

The Mayor of Third Class City who is President, Director and Stockholder of bank in which city funds are deposited violates Sec. 77.470 RSMo 1959. Section 105.490 RSMo Cum. Supp. 1965 is violated by said conflict of interest.

A mayor of a third class city has no lawful authority to appoint a member of the board of trustees of a special road district formed under Sections 233.010 to 233.165 RSMo 1959, and an attempted appointment of such an officer is void.

A mayor of a third class city who attempts to name himself to the office of member of the board of trustees of the city-owned hospital, is guilty of a violation of public policy and such attempted appointment is void.

March 3, 1966

*See 1978 Amendments to Ch. 105.*

OPINION No. 19 (1966)  
259 (1965)

Honorable Robert P. Warden  
Representative Second District  
415 North Moffet  
Joplin, Missouri



Dear Mr. Warden:

This is in answer to your request for an opinion on two questions concerning a mayor of a third class city. Your first question reads as follows:

"Is a mayor of a city of the third class in violation of Section 77.470 RSMo 1959, whenever the funds and revenues of the city and its institutions are deposited in a bank of which said mayor is a stockholder, officer and director?"

Subsequently you advised us by letter that the Mayor was President of the bank where the city funds were deposited and his son was vice president.

This question presents a so-called "conflict of interest" problem. The common law of this state without reference to any statutes has been declared by the courts.

The Supreme Court of Missouri in Nodaway County v. Kidder, 129 SW 2d 857, 861, has declared that a contract between an individual and a public body of which he is a member is void as against public policy:

Honorable Robert P. Warden

"[11, 12] Appellant's alleged contract was also void as against public policy regardless of the statute. A member of an official board cannot contract with the body of which he is a member. The election by a Board of Commissioners of one of its own members to the office of clerk and agreement to pay him a salary was held void as against public policy. \* \* \*"

The Supreme Court in a more comprehensive discussion of the common law on this subject in *Githens v. Butler County*, 165 SW 2d 650, 652 said:

"[1-3] ' \* \* \* The directors of a private corporation may, if there is no fraud in fact or unfairness in the transaction, contract on behalf of the corporation with one of their number. A stricter rule is laid down in regard to public corporations, and it is held that a member of an official board or legislative body is precluded from entering into a contract with that body.' 6 Williston, Contracts, §1735, p. 4895. The basis of this common law rule is that it is against public policy (State ex rel. Smith v. Bowman, 184 Mo. App. 549, 170 S. W. 700) for a public official to contract with himself. 'At common law and generally under statutory enactment, it is now established beyond question that a contract made by an officer of a municipality with himself, or in which he is interested, is contrary to public policy and tainted with illegality; and this rule applies whether such officer acts alone on behalf of the municipality, or as a member of a board of [or] council. \* \* \* The fact that the interest of the offending officer in the invalid contract is indirect and is very small is immaterial. \* \* \* It is impossible to lay down any general rule defining the nature of the interest of a municipal officer which comes within the operation of these principles. Any direct or indirect interest in the subject matter is sufficient to taint the contract with illegality, if the interest be such as to affect the judgment and conduct of the officer either in the making of the contract or in its performance. In general the disqualifying interest must be of a pecuniary or proprietary nature.' 2 Dillon, Municipal Corporations, §773; 46 C.J. § 308; 22 R.C.L., §121;

State ex rel. Streif v. White, Mo. App., 282 S. W. 147; Witmer v. Nichols, 320 Mo. 665, 8 S. W. 2d 63, Nodaway County v. Kidder, 344 Mo. 795, 129 S.W. 2d 857."

See also Polk Township, Sullivan County v. Spencer, 259 SW 2d 804, 805, and 67 C. J. S., Officers, Section 116, Page 406 and 407.

The Supreme Court used the following language in the case of Witmer v. Nichols, 8 SW 2d 63,65:

"\* \* \*Nichols as a member of the board of directors owed the school district an undivided loyalty in the transaction of its business and in the protection of its interest; this duty he could not properly discharge in a matter in which his own personal interests were involved. The principle is so well settled that we do not deem it necessary to cite authorities."

It therefore appears that it is settled law in Missouri that an individual may not deal with the city with respect to a contract where that person as an officer of the city is directly involved in a conflict of interest. With respect to third class cities the Legislature has enacted a specific statute relating to the subject. Section 77.470, RSMo 1959, which reads as follows:

"Officer prohibited from being interested in contracts, etc., how punished. -- If any city officer shall be directly or indirectly interested in any contract under the city, or in any work done by the city, or in furnishing supplies for the city, or any of its institutions, he shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine not exceeding two hundred dollars, or by imprisonment in the county jail not exceeding six months, or by both such fine and imprisonment; and upon the city council, or any member thereof, becoming satisfied that any officer of the city is so interested, the council shall, as soon as practicable, be convened to hear and determine the same, and if, upon investigation, such officer be found so interested, by a majority of all the members elected to the council, he shall be immediately dismissed from office."



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This section of the statute was specifically considered by the St. Louis Court of Appeals in *State ex rel Streif v. White*, 282 SW 147 where the Court said:

"[3] The charter of the City of Mexico (section 8237, Revised Statutes 1919), provides that, 'if any city officer shall be directly or indirectly interested in any contract under the city, or in any work done by the city, or in furnishing supplies for the city, or any of its institutions, he shall be deemed guilty of a misdemeanor,' and Section 3665 Revised Statutes 1919 contains the same provision. There ought to be no question that the contract involved here is within the purview of these sections of the statute. Though the contract relates to a gift to the city in trust for the specific purpose of erecting a drinking fountain, nevertheless the contract was a contract under the city, and the work of erecting the fountain was work done by the city, within the meaning of these sections. This being so, the contract was illegal and void. As mayor of the city Gallaher had the superintending control of all the officers and affairs of the city, and it was his duty to see that the ordinances of the city and the state laws relating to the city were complied with. It was his duty to preside over the council and cast the deciding vote in case of a tie. He also had the power to veto any ordinance, resolution, or order of the council. As mayor he approved the ordinance providing for the erection of the fountain, had the plans drawn therefor, appointed a committee to get bids on the work, approved the award of the work to the relator, and signed the written contract therefor on behalf of the city. His direct interest in the contract as a partner of relator was found by the chancellor, to whose finding we ought and do defer. The contract was *malum prohibitum* if not *malum in se*. Equity will not assist a party to reap the rewards of a contract prohibited by the statute. It will not compel an officer to become a party to an illegal transaction against his will.  
\* \* \*

The problem then appears to be whether or not the mayor who is also President of a bank in which the city's funds are deposited is "directly or indirectly interested in any contract of the city." This then involves an examination of the statutes relating to depositary contracts or arrangements.

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The 1965 Session of the Legislature amended several sections of the statutes relating to the financial administration of third class cities. These were Sections 95.280, 95.285, 95.290 and 95.300, RSMo Cumulative Supplement 1965. At the outset it must be kept in mind that the city may have two types of bank deposits. First a demand deposit and second - a time deposit. The provisions of Sections 95.280, 95.285, 95.290 and 95.300, RSMo Cum. Supp. 1965, can apply only to time deposits because it will be noted that Section 95.280 commences with the language, "Subject to the provisions of section 110.030 RSMo \* \* \*".

Section 110.030, RSMo 1959, provides as follows.

"Advertisement for bids unnecessary, when -  
The various statutory provisions in relation to the advertisement for and receipt of bids and the award of the funds to the best bidder or bidders for the whole or any part of any of the public funds of the character referred to in section 110.010 shall be applicable only if and when at the time of said advertisement and award, it shall be lawful for banking institutions to pay interest upon demand deposits, in which event such applicable statutory provisions shall be complied with; but if, at the time of the advertisement for bids or the receipt of bids or the award of funds, it shall be unlawful for depositary banks and trust companies to pay interest upon such demand deposits, the award or awards of such funds shall be made in each case, without bids and without requiring the payment of any bonus or interest, by the authority or authorities which are by statute empowered to make the awards of such funds upon bids."

It is, however, well known that regulations of the Federal Reserve System prevents any bank from paying interest upon demand deposits. We are not advised in the facts given us in this inquiry as to whether the deposits were demand deposits or time deposits or both. We were also not advised as to the exact procedure that the city has in the past adopted for selecting the depositary of the city's funds, whether by ordinance or resolution and whether by contract or selection or by order.

The principle object apparently of the Legislature in revising Sections 95.280 to 95.300, supra, was to authorize a bank depositary



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to post securities in place of a surety bond, and otherwise improve the language of the sections. Section 95.285 relating to the opening of the sealed proposals submitted by depositaries uses the language:

"\* \* \*the city council shall select as the depositary of the funds of the city \* \* \*"

And again in Section 95.290, supra, relating to the deposit of securities by the depositary selected by the council uses the language "the council, by order entered upon the journal shall designate the banking institution as the depositary of the funds of the city \* \* \*". At other points in this same section is reference to the "selection" of the depositary by the city council. In Section 95.300, supra, relating to the failure of the council to select a depositary it refers to the fact that the city council at a subsequent meeting may make a new "selection" of a depositary in the same manner as provided in other sections and further provides:

"\* \* \* If the city council at any time deems it necessary for the protection of the city, it may require, by resolution, that the depositary deposit additional security. If the depositary fails to do so within five days after the service of a copy of the resolution on the depositary, the city council may select another depositary in the manner provided."

It is therefore noticed that these facts relating to the selection of a depositary and the depositing of securities by the depositary is done by "the council" and by "order" and by "resolution". These statutes seem to contemplate, therefore, that the selection of the depositary and other compliance with these statutes shall be done by order or by resolution of the council and not by ordinance. Generally action by the council upon a resolution or an order does not require any act by the mayor.

This situation then requires an examination of the statutes relating to duties and powers of the mayor and the city council of third class cities. This subject is dealt with in Chapter 77 of the Revised Statutes. Section 77.250, RSMo 1959, provides that the mayor shall be the president of the council and shall preside over the same but shall not vote except in case of a tie in said council, when he shall cast the deciding vote, but that he shall have no power to vote in cases where he is an interested party.

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This section further provides:

"\* \* \*He shall have the superintending control of all the officers and affairs of the city, and shall take care that the ordinances of the city and the state laws relating to such city are complied with."

Section 77.260, RSMo 1959, provides:

"The mayor and council of each city governed by this chapter shall have the care, management and control of the city and its finances and shall have power to enact and ordain any and all ordinances not repugnant to the constitution and laws of this state, and such as they shall deem expedient for the good government of the city, the preservation of peace and good order, the benefit of trade and commerce, and the health of the inhabitants thereof, and such other ordinances, rules and regulations as may be deemed necessary to carry such powers into effect, and to alter, modify or repeal the same."

Section 77.270, RSMo 1959, provides:

"Every bill presented to the mayor and returned to the Council with the approval of the mayor shall become an ordinance and every bill presented aforesaid, but returned with his objection thereto shall stand reconsidered. \* \* \*"

This section further provides:

"\* \* \*The mayor shall have power to sign or veto any ordinance passed by the city council, and shall also possess the power to approve all or any portion of the general appropriation bill, or to veto any item or all of the same; \* \* \*"

Section 77.280, RSMo 1959, provides the mayor shall also have the power to veto any resolution or order of the council which calls for or contemplates the expenditure of the revenues of the city. Such veto "shall be effective and binding unless the council, at a subsequent session thereof, general or special, shall pass said resolution or order by a vote of three-fourths of all the members elected to the council."

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Section 77.290 RSMo 1959, provides:

"The mayor shall from time to time communicate to the council such measures as may, in his opinion, tend to the improvement of the finances, the police, health, security, ornament, comfort and general prosperity of the city."

Section 77.310 RSMo 1959, provides:

"The mayor shall have power to require, as often as he may deem it necessary, any officer of the city to exhibit his accounts or other papers or records, and to make reports to the council, in writing, touching any subject or matter pertaining to his office."

Section 77.320 RSMo 1959, provides that the mayor shall sign the commissions and appointments of all city officers elected or appointed in the city and provides:

"\* \* \*He shall sign all orders and drafts drawn on the treasury for money, and cause the city clerk to attest the same, and to affix thereto the seal of the city, and to keep an accurate record thereof in a book to be provided for that purpose."

We should also note the provisions of Section 77.400 RSMo 1959, which defines the term officer as follows:

"Term 'officer' construed. - The term 'officer', whenever used in this chapter, shall include any person holding any situation under the city government or any of its departments, with an annual salary, or for a definite term of office."

It is therefore to be noted that while the mayor of a third class city generally speaking has no vote in the city council except in the case of a tie, (and not then when he is an interested party) either on ordinances or resolutions, nevertheless the mayor has wide superintending control and power over the city, its officers, its affairs and particularly its finances. This leads us, therefore, to the conclusion that even though the mayor would not normally vote on the selection of a depositary, whether the matter is submitted

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to the council in the form of an ordinance to approve a contract with the depositary or whether it is submitted to the council in the form of a resolution merely selecting a depositary we believe that the mayor as chief executive officer having such extensive power and authority over the affairs of the city is a city officer within the meaning of Section 77.040 and being the chief executive officer of the depositary is directly interested in a contract under the city.

We turn now to a consideration of the effect, if any, of the recently enacted Conflict of Interest Law, House Bill 422, 73rd General Assembly, Sections 105.450 to 105.495, RSMo Cumulative Supplement 1965.

This statute while inartificially drawn and presenting as it does problems of construction, we believe the legislative intent can be found and so interpreted.

Section 105.490 RSMo Cumulative Supplement 1965, provides:

"1. No officer or employee of an agency shall transact any business in his official capacity with any business entity of which he is an officer, agent or member or in which he owns a substantial interest; nor shall he make any personal investments in any enterprise which will create a substantial conflict between his private interest and the public interest; nor shall he or any firm or business entity of which he is an officer, agent or member, or the owner of a substantial interest, sell any goods or services to any business entity which is licensed by or regulated in any manner by the agency in which the officer or employee serves."

Section 105.450 RSMo Cumulative Supplement 1965, defines Agency as follows:

"'Agency', any department, office, board, commission, bureau, institution or any other agency, except the legislative and judicial branches of the state or any political subdivision thereof including counties cities, towns, villages, school, road, drainage, sewer, levee and other special purpose districts;"  
(As printed in the 1965 Official Cumulative Supplement)

We meet at once with the problem as to what is included and what is excluded in the Act's definition of "Agency". The exception clause above referred to read literally excepts the legislative and judicial branches of the State and all the political subdivisions therein mentioned including counties, cities and others. We note, however, that House Bill 422, as Truly Agreed to and Finally Passed, has a comma immediately after the words "judicial branches". If this definition is read literally, agency would be applicable only to the executive department and boards and commissions of the State of Missouri. If this language were construed with the comma following the word "branches" as the bill was passed we meet some other difficult problems. This would then provide an exception and make the law not applicable to the judicial and legislative branches of political subdivisions. This would produce most difficult and artificial interpretations of what is executive and what is legislative in cities, school districts, road districts and other specified districts. This would cause interpretation that would or might be artificial and unrealistic. It might also largely nullify what we believe was the legislative intent and purpose to stop the conflict of interest evil. We are convinced that the legislative intent was that the exception clause was intended to apply only to the Legislative and Judicial Branches of the state. The punctuation should have been therefore that a comma should be after the word "State". We therefore believe that the Legislative intent was that the word agency was intended to be applicable to any political subdivision of the state, including counties, cities, towns and villages, school, road, drainage, sewer, levee and other special purpose districts.

Turning now to the first clause of Section 105.490 which provides as follows:

"1. No officer or employee of an agency shall transact any business in his official capacity with any business entity of which he is an officer, agent or member or in which he owns a substantial interest; \* \* \*"

It is perfectly clear that an officer of an agency includes the mayor of a third class city. Thus, this provision prohibits the mayor from transacting any business with any business entity of which he is an officer. Clearly as president of a bank the mayor of the city is transacting business with the bank when the city deposits the city funds in that bank. We have heretofore discussed in this opinion the powerful executive control which the mayor of a third class city has and exercises over the operation and affairs



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including financial affairs of the city. What then is the meaning of the phrase "In his official capacity"? Undoubtedly the legislative intent was to distinguish between an officer of the city in his personal and private business and his business affairs on behalf of the city or other agency of which he is an officer. It is therefore our view that the mayor of a third class city in his supervisory control and authority over the affairs of the city and the possibility that he might or could vote on either an ordinance or resolution of the city council selecting a depository, or sign a contract or agreement between the city and the depository, or possibly fail to act where the city funds are in jeopardy within his knowledge by reason of some act or conduct either by other officers or employees of the bank or other officers of the city would constitute a conflict of interest in violation of Section 105.490, RSMo Cumulative Supplement 1965.

Your next question reads as follows:

"Does a mayor of a city of the third class forfeit his office under Article 7, Section 6, Missouri Constitution, when he has named or appointed himself with the approval of the city council to be a trustee or board member of a special road district of said city, or a trustee of a city owned hospital?"

You state that the mayor appointed himself to the board of trustees of a special road district and such action was approved by the city council. We are unable to find any authority for a mayor to appoint members of the board of trustees of a special road district.

Section 233.040 RSMo 1959, applicable to road districts established under provisions of Sections 233.010 to 233.165, RSMo 1959, generally referred to as eight mile districts, provides that the members of the board of trustees of such districts shall be appointed by a board composed of the county judges of the county in which the district is located and the mayor and council members of any city or town in such district.

However, this alleged appointment was apparently not made under such section and we therefore regard the alleged appointment by the mayor with the approval of the city council as being void, because it was without any lawful authorization.

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Article VII, Section 6, of the Missouri Constitution prohibits appointment or employment by public officials of their relatives. Such section has no applicability to self-appointment and does not apply to the question you ask.

Therefore, the attempted appointment by the mayor of himself as a member of the board of trustees of the city-owned hospital is not a violation of the constitutional nepotism provision.

However, the attempted appointment by an officer of himself to public office is against public policy and void.

In State v. McDaniel, 52 Del. 304, 157 A. 2d 463, at 466, the Court stated:

"\* \* \*The general law has been laid down  
\* \* \* that it is contrary to public policy  
to permit a board to exercise its power of  
appointment by designating someone from its  
own body \* \* \* Such purpose cannot be attained  
when the appointee, as a member of the appointing  
body has the opportunity for a closer associa-  
tion and influence upon the members much greater  
than would be the case where the persons con-  
sidered for appointment were not members of  
the appointing body."

The Court went further and at page 467, held such viola-  
tion of public policy as "void".

In Commonwealth v. Major, 343 Pa. 355, 22 A. 2d 686, the  
Court stated at p. 689:

"\* \* \* that there is 'a virtual unanimity of  
opinion,' among all responsible men that it is  
against public policy for a public official  
to appoint himself to another public office  
within his gift, is beyond all question. Courts  
not only of this Commonwealth, but of every other  
jurisdiction known to us, have uniformly held  
that personal interest of a public officer creates  
disqualification \* \* \*. Furthermore, even if  
respondent had not voted for his own appointment  
for the other members of council of which he  
was a member to have placed him on the Board \* \* \*  
would, nevertheless, still have been definitely  
against public policy."



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In Wood v. Town of Whitehall, 120 Misc. 124, 197 N.Y.S. 789, at page 790, where the appointee did not participate in voting, the Court states:

"It seems clear to me it would be contrary to public policy and the general welfare to uphold such appointment \* \* \* an appointing board cannot absolve itself from the charge of ulterior motives when it appoints one of its own members to an office. It cannot make any difference whether or not his own vote was necessary to the appointment."

In State ex rel Smith v. Bowman, 184 Mo. App. 549, 170 SW 700, the Court, citing numerous authorities held that such appointment by an appointing authority of one of its members is against public policy, stating at page 701:

"The defendant contends, and in this we agree as did the learned trial judge, that granting that the power and duty to select a city clerk is vested in the city council, then such council could not select and appoint one of its own number to that office. This is true because such exercise of the appointive power is against public policy \* \* \*"

And at page 702, of this same case, it is stated:

"These and numerous other decisions show that in determining what is or is not against public policy, we may and should go to the common law and to the decisions of other states as well as our own, the same as in determining any other rule of substantive law. We are also to consult the Constitution and statutes of our state on kindred and cognate subjects.

Tested in this manner, we have no hesitancy in holding that it is against public policy to allow a body of public officials having the appointive power to fill an office to appoint one of their own number to such office \* \* \*"

Honorable Robert P. Warden

CONCLUSION

It is the opinion of this office that the Mayor of a third class city who is president, director and stockholder of the bank in which the city's funds are deposited violates Section 77.470 RSMo 1959.

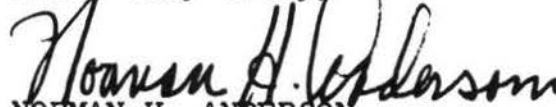
Section 105.490, RSMo Cumulative Supplement 1965, is violated by said conflict of interest.

A mayor of a third class city has no lawful authority to appoint a member of the board of trustees of a special road district formed under Sections 233.010 to 233.165 RSMo 1959, and an attempted appointment of such an officer is void.

A mayor of a third class city who attempts to name himself to the office of member of the board of trustees of the city-owned hospital, is guilty of a violation of public policy and such attempted appointment is void.

The foregoing opinion which I hereby approve was prepared by my assistant, J. Gordon Siddens.

Yours very truly,

A handwritten signature in dark ink, appearing to read "Norman H. Anderson", written in a cursive style.

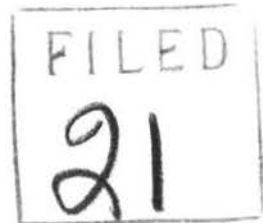
NORMAN H. ANDERSON  
Attorney General

CITY LIBRARIES: City council is unauthorized to convey real  
REAL ESTATE: estate, legal title of which is in board of  
OWNERSHIP: SALE OF: trustees of city library for use and benefit  
of library. When board of trustees of city  
library uses library tax funds to purchase  
real estate to be used for library purposes,  
deed of conveyance should be to board of  
trustees.

OPINION NO. 21 (1966)  
OPINION NO. 279 (1965)

April 8, 1966

Honorable Charles O'Halloran  
State Librarian  
State Office Building  
Jefferson City, Missouri



Dear Mr. O'Halloran:

This office is in receipt of your request for a legal opinion regarding ownership of property by a city library board and asks two questions. The first inquiry reads as follows:

"May the City Council of a city sell a building to which a library board has clear title on the theory that the library board is a 'creature of the city?' "

The above inquiry does not state that the real estate was purchased by the library board of trustees for the purpose of providing a library building, site, grounds or for other purposes necessary or useful to the city library. However, we assume such facts in this opinion.

Sections 182.140 to 182.301, RSMo 1959, as amended, is the statutory law of Missouri pertaining to public libraries in all classes of cities, and we shall presently refer to some of these sections.

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Section 182.200, provides for the organization of the board of trustees of a city library, which procedure shall be followed immediately after the members have been appointed. Paragraph 4 of said section provides that the board shall have exclusive control of the expenditure of all moneys collected to the credit of the library fund, as well as exclusive control over the construction, supervision and custody of all library buildings and grounds. All money received for the library shall be deposited in the city treasury to the credit of the library fund, which fund shall be kept separately from other funds of the city, and the library fund shall be disbursed only upon the properly authenticated warrants of the library board.

Paragraph 5 of Section 182.200, is of particular significance to the above inquiry, and reads as follows:

"The board, as a body corporate, may sue and be sued, complain and defend, and make and use a common seal, purchase or lease grounds, purchase, lease, occupy or erect an appropriate building or buildings for the use of the public library and branches thereof, sell and convey real estate and personal property for and on behalf of the public library and branches thereof, receive gifts of real and personal property for the use and benefit of the public library and branch libraries thereof, the same when accepted to be held and controlled by the board of trustees, according to the terms of the deed, gift, devise or bequest of such property."

From the above quoted section the board of trustees has been granted certain specific powers, among which, as a body corporate, are those of purchasing, leasing, occupying or erecting an appropriate building or buildings for the library and branches, selling and conveying real and personal property for and on behalf of the library; receiving and controlling gifts of real and personal property for benefit of the library and branches, according to the terms of the deed, gift, devise or bequest of such property.

It is noted that the above mentioned powers have been granted to the library board, and while Section 182.170 provides for the appointment of a nine-member library board by the mayor, with the approval of the city council, and Section 182.190 author-

Honorable Charles O'Halloran

izes the filling of vacancies on the library board in the same manner as original appointments are made, these two sections are the only Missouri statutes authorizing any connection or dealings between the mayor and city council, and the library board of trustees. Legally, the mayor and council have no directory or supervisory control over the library board, nor can the council perform the official duties of the library board. It necessarily follows that the mayor and council, the mayor, or the council are unauthorized by any Missouri statute to sell real estate of which the legal title is in the library board of trustees. It is also true that the city is legally unauthorized to take title of city library property. Clearly, Section 182.200 (5), supra, grants exclusive control over all library funds and other property, including the purchasing and selling of real estate belonging to the library.

Therefore, in view of the foregoing, our answer to the first inquiry is that a city council is legally unauthorized to sell and convey real estate of a city library when the legal title of such property is in the board of trustees of such library.

The second inquiry of the opinion request reads as follows:

"If tax funds levied and collected for library purposes are used to purchase real estate, must the title to that real estate be in the city, or may it be in the city library board?"

We have previously noted that Section 182.200(5), supra, grants exclusive control over all library funds to the library board, and when the proper procedure has been followed, in compliance with the section, such funds or any part of same may be used to purchase real estate for a public library (building) or grounds.

When real estate is purchased for library purposes, the deed of conveyance should be to the "City Library Board of Trustees," as grantee. It is unnecessary and undesirable to name each board member as a trustee-grantee, because the Board is a corporate body. A deed to the Board as grantees, without naming them is sufficient to vest title of the real estate in such city library. *Missouri Wesleyan College v. Shulte*, 142 S.W. 2d 644.

Honorable Charles O'Halloran


CONCLUSION

Therefore, it is the opinion of this office that a city council is unauthorized to sell and convey real estate, the legal title to which is in the board of trustees of such city library.

It is the further opinion of this office that when the board of trustees of a city library uses library tax funds to purchase real estate to be used for library purposes, as provided by Section 182.200(5), RSMo, a deed of conveyance to such trustees as grantee is proper.

The foregoing opinion which I hereby approve was prepared by my assistant, Paul N. Chitwood.

Yours very truly,



NORMAN H. ANDERSON  
Attorney General



NO. 23 (1966)

June 6, 1966



Honorable Arthur B. Cohn  
Prosecuting Attorney of Pulaski County  
Waynesville, Missouri

Dear Mr. Cohn:

This letter is in answer to your request for an opinion of this office on the question of whether the Board of Equalization of Pulaski County has the power to make a blanket raise of the assessments of the inventories of all merchants of Pulaski County.

Sections 150.010 to 150.290 RSMo, govern merchants' taxes. Section 150.060 RSMo reads:

"1. The assessor or the county clerk shall return the merchants' tax book and the assessor shall make the reports required by section 150.055 to the county board of equalization on the second Monday, in July in each year, which said board is hereby required to meet at the office of the clerk of the county court on the second Monday in July in each and every year, for the purpose of equalizing the valuation of merchants' statements, and to that end shall carefully compare the statements made by such merchants with the reports made by the assessor under section 150.055, and shall have the same powers and shall proceed in the same manner as provided by law, for the equalization of real and personal property, so far as is consistent with the provisions of sections 150.010 to 150.290; but after the board shall have raised the valuation

Honorable Arthur B. Cohn

of any statement, it shall give notice of the fact to the person, corporation or firm whose statement shall have been raised in amount, by personal notice through the mail, specifying the amount of such raise, and that the said board will meet on the second Monday in August to hear reasons, if any may be given, why such increase should not be made.

"2. The members of the county board of equalization shall receive the same per diem for services under this section as provided by law for services in equalizing real and personal property, and the sum of the valuation of the statements as equalized by the county board of equalization shall be included in and made a part of the total valuation of property taxable for all purposes."

Section 150.060 thus provides that in equalizing merchants' taxes the county board of equalization "shall proceed in the same manner as required by law, for the equalization of real and personal property." The manner of equalizing real and personal property here pertinent is set out in Sections 138.030 and 138.050 RSMo.

Section 138.030 RSMo reads:

"1. The members of the county board of equalization shall each take an oath, to be administered by the clerk, to fairly and impartially equalize the valuation of all real estate and tangible personal property taxable by the county.

"2. The board shall hear complaints and equalize the valuation and assessments upon all real and tangible personal property taxable by the county so that all the property shall be entered on the tax book at its true value. The board shall not reduce the valuation of the real or tangible personal property below the value thereof as fixed by the state tax commission."

Honorable Arthur B. Cohn

Section 138.050 RSMo reads:

"The following rules shall be observed by county boards of equalization:

"1. They shall raise the valuation of all tracts or parcels of land and all tangible personal property as in their opinion have been returned below their real value; but, after the board has raised the valuation of such property, it shall give notice of the fact, specifying the property and the amount raised, to the persons owning or controlling the same, by personal notice or through the mail if address is known, or if address is unknown, by notice in one issue of any newspaper published within the county at least once a week, and that said board shall meet on the second Monday in August, to hear reasons, if any be given, why such increase should not be made; the board shall meet on the second Monday in August in each year to hear any person relating to any such increase in valuation;

"2. They shall reduce the valuation of such tracts or parcels of land or any tangible personal property which, in their opinion, has been returned above its true value as compared with the average valuation of all the real and tangible personal property of the county."

The following language in State v. Christian County Bank, Mo., 136 S.W. 335, 1.c. 336, is applicable here.

"Under the foregoing provisions of the statutes, it is made the duty of the board of equalization, not only to equalize the valuation and assessment of all the property in the county, but to equalize it 'so that each tract of

Honorable Arthur B. Cohn

land shall be entered on the tax book at its true value,' and it shall 'raise the valuation of all such tracts or parcels of land and any personal property, such as in their opinion have been returned below their real value, according to the rule prescribed by this chapter for such valuation.' The only limitation upon the power of the board in thus fixing the value of the taxable property is that it 'shall not reduce the valuation of the real or personal property of the county below the value thereof as fixed by the said state board of equalization.' [Under present law the state tax commission]."

The cited case held that an order of a county board of equalization was valid, which order was as follows:

"Ordered by the board that real and personal property, situate in Christian County be raised 10 per cent."

The Court reasoned that it was within the power of the Board to raise the valuation of property of the county upon a percentage basis, and if the board found no inequality in the assessment, but found that both real and personal property had been assessed 10 per cent below its real value, no valid reason existed to prevent the board from increasing the value by the order. See also *May Department Stores Co. v. State Tax Commission, Mo.*, 308 S.W.2d 748.

Accordingly, it is our view that the board of equalization of Pulaski County may, by a blanket order, increase the assessment of the inventory of all the merchants of the county so long as the quoted provisions of Section 138.050 RSMo 1959, are complied with, including the notice provisions thereof.

Yours very truly,

NORMAN H. ANDERSON  
Attorney General

DLR/sj/aa

TREASURER: (1) The proposals of the St. Louis  
PAYROLL WARRANT REGISTER: County Auditor that the St. Louis County  
CHECKS: Treasurer (1) provide the Data Process-  
ing Department with a beginning check  
number and (2) that the Treasurer incorporate the records produced  
by another department into his register, would both violate the  
statutory duties of the Treasurer.

OPINION NO. 323 (1965)  
OPINION NO. 27 (1966)

February 2, 1966



Honorable Haskell Holman  
State Auditor  
State of Missouri  
Jefferson City, Missouri

Dear Mr. Holman:

This is in response to your August 5, 1965, request for an opinion from this office concerning the legal status of several proposals of the St. Louis County Auditor. The proposals, if adopted, would affect the functions of the St. Louis County Treasurer. The proposals of the St. Louis County Auditor, as we understand them, are set out and discussed in I and II below.

Prior to discussing the proposals, however, we feel it is necessary to discuss briefly the general legal complexion of St. Louis County.

St. Louis County has heretofore adopted a special charter under the provisions of Sections 18(a) to 18(1) of Article VI of the Missouri Constitution of 1945.

The Charter has no specific article or section outlining the powers and duties of the County Treasurer, although, Section 3 provides for the election of a County Treasurer, and Section 44 states that the Treasurer shall be head of the Division of Finance in the Department of Finance & Records.

The County, by use of its charter, is required to provide "for the exercise of all powers and duties of counties and county officers prescribed by the constitution and laws of the State." Article VI, Section 18(b), Missouri Constitution.

Although the charter takes precedence over general statutory provisions with respect to the agencies in the various counties in the state, (State ex rel. Shepley v. Gamble, 280 S.W. 2d 656, 662),

Honorable Haskell Holman

the St. Louis County charter has no provisions with respect to the duties of the treasurer.

To treat the charter as out of and beyond all legislative influence would be to nullify the express constitutional limitations. (See Kansas City v. Field, 12 S.W. 802). The county charter operates against the backdrop of general statutory provisions. The charter must not be out of harmony with the general laws of the state nor invade the provisions of general legislation nor attempt to change the policy of the state. (Kansas City v. Marsh Oil Company, 41 S.W. 493).

Since the framers of the Charter of St. Louis County did not see fit to specifically spell out the duties of the County Treasurer, the statutes must be employed to supplement the charter.

\* \* \*

In order to more fully understand the problems you pose in your letter, it was necessary for us to look into the payroll system as it now functions in St. Louis County.

Stating it as simply as possible, we understand the following to be the procedure now employed in issuing paychecks by St. Louis County.

1. At the same time as the preceding payroll period checks are issued, each department receives a printed Payroll Time Record from the Data Processing Department. This record is anticipatory and based on the preceding payroll.

2. At the end of the pay period the departments review the Time Records; make any necessary changes; an authorized person signs it; and the Time Record is returned to the County Auditor.

3. The Auditor forwards this information to the Data Processing Department.

4. Data Processing runs the Payroll Register, based on the latest updated Payroll Time Record, showing the actual amount of the payroll, deductions, etc.

5. Data Processing runs the updated Time Records for the next pay period.

6. Data Processing runs the checks and the payroll Warrant Register. The auditor supplies a beginning Warrant number to be printed on the warrants by Data Processing as well as in the Warrant Register. The Payroll Warrant Register is prepared by Data Processing and is an itemized list and summary of all checks issued and the total for each fund and department.



7. After the checks and warrants are run, the Treasurer and Auditor bring their signature plates to Data Processing and Data Processing again runs the warrants and checks, stamping them with the Auditor's signature and the Treasurer's signature respectively.

8. The Treasurer immediately takes the checks and the warrants to his office.

9. A Treasurer's check number is stamped with a numbering machine on both the paycheck and the warrant, by the Treasurer.

10. The checks are then listed by the Treasurer on the Register of Warrants and Checks Issued by the Treasurer. This listing is done on a Burroughs Bookkeeping Machine and the machine automatically prints the date issued and the Treasurer's check number on the Register.

11. An adding machine tape is run on the checks and is used by the bookkeeping machine operator for balancing his records against the checks issued, under the control of the Treasurer.

12. Each check is entered in the Treasurer's Register individually.

The St. Louis County Auditor has proposed several changes in the foregoing payroll procedure.

The question has been raised as to whether or not such proposals would breach the authority and responsibility of the St. Louis County Treasurer.

## I

It is proposed that the treasurer furnish the Data Processing Department with his beginning check number (at step 6 above) and permit the check numbers to be printed on the paychecks and the warrant at the same time the checks are written.

Section 110.240, RSMo 1959, calls for the Treasurer to draw his check upon the presentation of any warrant drawn by proper authority. In this case the warrants are, in effect, drawn by the county and authorized by the county supervisor. The statute refers to warrant and check in the singular and, in fact, the warrants and checks are printed, though quite rapidly, on an individual basis with each check attached to its respective warrant. All information is printed on the checks by Data Processing such as, the employees name, the warrant number, the amount of the check, etc., and the check is stamped with the Treasurer's signature.

However, it is to be noted that the checks are not marked with the check number at this point and without such number, although potentially negotiable, they are not considered valid by the county. In short, the checks have not yet been drawn by the Treasurer. Literally from the instant the checks emerge from the Data Processing machine unnumbered, the Treasurer exerts physical control over them and continues to exercise such control until the checks are validated with the check number, i.e., drawn (steps 8 to 12).

The Auditor proposes that the validating check number be marked on the checks at the time they are run. We fail to see how such a procedure would meet the statutory requirements of Section 110.240, RSMo 1959. Section 110.240, RSMo 1959, requires the Treasurer to be presented with the warrant prior to his drawing the check. Under the St. Louis County Auditor's proposal the checks would be drawn simultaneously with the warrants with no intermediate act performed by the Treasurer. Hence the functions the Treasurer is required to perform by statute would be eliminated.

It is important that the sequence, as set out in 110.540, be followed. It affords the Treasurer an opportunity to perform duties he is required by law to perform. Sections 54.140, 110.240 and 50.160 to 50.310, RSMo 1959. He is criminally liable if he fails to perform certain of these duties, Sections 50.320 and 54.140, RSMo 1959.

## II

It is proposed that instead of entering the individual paychecks and warrants in the Treasurer's Register (step 10 above), the Treasurer only enter the total of the checks issued for each fund and incorporate the Payroll Warrant Register (produced by Data Processing) into the Treasurer's Register, since it shows the same information as the Treasurer records on his books.

Section 50.220, RSMo 1959, requires:

"[The Treasurer] shall procure and keep a well-bound book, in which he shall make an entry of all warrants presented to him for payment, which shall have been legally drawn for money by the county court of the county of which he is the treasurer stating correctly the date, amount, number, in whose favor drawn, by whom presented, and the date same was presented; and all warrants so presented shall be paid out of the funds mentioned in such warrants, and in the order in which they shall be presented for payment; provided, however, that no warrant issued on account of any debt incurred by any county other than those issued on account of the ordinary and usual expenses of the county, shall be paid until all warrants issued for money due from the county on account of

Honorable Haskell Holman

services that are usual, and for all expenses necessary to maintain the county organization for any one year, shall have been fully paid and liquidated."

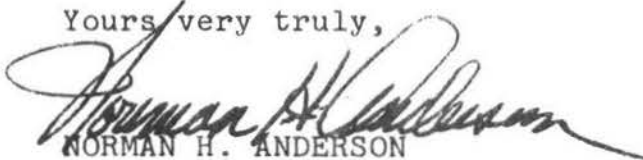
The foregoing statute clearly requires the Treasurer to make the entries himself, this can reasonably be extended to mean by himself or members of his staff. There is no authority in any statute for the Treasurer to adopt the Data Processing records. A record prepared by Data Processing, a separate department not under the control, authority or supervision of the Treasurer, would not be a record prepared by the Treasurer, pursuant to Section 50.220, RSMo 1959.

While these proposals may incorporate new ideas and new methods and may be more efficient and reduce the cost of operation of the county and even in all respects may be desirable yet the determination of this policy is for the legislature and the people to decide. This office is not authorized to do so by interpretation of the law contrary to its manifest meaning.

#### CONCLUSION

Therefore, it is the conclusion of this office that it would breach the authority and duty of the St. Louis County Treasurer if he (1) furnished the Data Processing Department of St. Louis County with a beginning check number and authorized payroll checks to be drawn simultaneously by such department with the printing of the paycheck warrants or if he (2) incorporated a record produced by the Data Processing Department into those records he is required by law to make himself.

Yours very truly,

  
NORMAN H. ANDERSON  
Attorney General

MOTOR VEHICLE SAFETY  
RESPONSIBILITY ACT:  
MOTOR VEHICLES:  
SAFETY RESPONSIBILITY  
UNIT:

The Missouri State Highway Patrol or any peace officer, at the direction of the Director of Revenue, may secure the possession of the registration of a jointly owned vehicle where an operating joint-owner of a motor vehicle has caused the suspension of registration of such motor vehicle through violation of provisions of the Safety Responsibility Law.

OPINION NO. 29 (1966)  
330 (1965)

June 28, 1966

Honorable Carroll M. Blackwell  
Prosecuting Attorney  
Callaway County  
Fulton, Missouri



Dear Mr. Blackwell:

Your request for an official opinion from this office reads as follows:

"A request has been made by me for an opinion involving Section #303.330, RSMo 1959. Under this provision any person whose registration has been suspended may have his vehicle registration taken by the Highway Patrol or any peace officer for surrender to the Director of Safety Responsibility. My question involves the situation where a vehicle is registered in joint ownership and due to the conduct of one of the joint owners, in violation of the responsibility law, the vehicle registration is suspended. May a peace officer lift the vehicle registration plate from that vehicle where one of the joint owners has violated that law but where the lifting of the registration may affect the other joint owner who may be an innocent party."

The pertinent statutory provisions of the Safety Responsibility Law follow:

Section 303.020, RSMo Cum. Supp. 1965, provides in part as follows:

"As used in this chapter the following words and phrases shall mean:

\* \* \* \* \*

"(8) 'Operator', a person who is in actual physical control of a motor vehicle;

Honorable Carroll M. Blackwell

"(9) 'Owner', a person who holds the legal title to a motor vehicle; or in the event a motor vehicle is the subject of an agreement for the conditional sale or lease thereof with the right of purchase upon performance of the conditions stated in the agreement and with an immediate right of possession vested in the conditional vendee, or lessee, or in the event a mortgagor of a motor vehicle is entitled to possession thereof, then such conditional vendee or lessee or mortgagor;

"(11) 'Registration', registration certificate or certificates and registration plates issued under the laws of this state pertaining to the registration of motor vehicles;"

Section 303.030, RSMo Cum. Supp. 1965, provides in part as follows:

"2. The director shall, within forty-five days after the receipt of such report of a motor vehicle accident, suspend the license of each operator, and all registrations of each owner of a motor vehicle, in any manner involved in such accident, . . . ; provided notice of such suspension shall be sent by the director to such operator and owner not less than ten days prior to the effective date of such suspension and shall state the amount required as security. (Emphasis added)

\* \* \* \* \*

"4. This section shall not apply under the conditions stated in section 303.070, nor:

"(1) To such operator or owner if such owner had in effect at the time of such accident an automobile liability policy with respect to the motor vehicle involved in such accident;

"(2) To such operator, if not the owner of such motor vehicle, if there was in effect at the time of such accident an automobile liability policy or bond with respect to his operation of motor vehicles not owned by him;



Honorable Carroll M. Blackwell

"(3) To such operator or owner if the liability of such operator or owner for damages resulting from such accident is, in the judgment of the director, covered by any other form of liability insurance policy or bond; nor

"(4) To any person qualifying as a self-insurer under section 303.220, or to any person operating a motor vehicle for such self-insurer."

Section 303.070, RSMo 1959:

"The requirements as to security and suspension in Section 303.030, shall not apply:

"(1) To the operator or the owner of a motor vehicle involved in an accident wherein no injury or damage was caused to the person or property of anyone other than such operator or owner;

"(2) To the operator or the owner of a motor vehicle legally parked at the time of the accident;

"(3) To the owner of a motor vehicle if at the time of the accident the vehicle was being operated without his permission, express or implied, or was parked by a person who had been operating such motor vehicle without such permission;"

These sections provide that where one, not the owner of a motor vehicle drives such motor vehicle with the knowledge and consent of the owner, and is involved in an accident, the owner is subject to the suspension provisions of Section 303.030, Subsection 2, in that this section covers "each owner of a motor vehicle in any manner involved in such accident." This means that when a vehicle is involved in an accident all the owners thereof are subject to the suspension provisions of the statute.

Further, there is nothing contained in Sections 303.030, Subsection 4, or 303.070, to remove or except a non-operating, joint owner from compliance with the security requirements of this chapter.



Honorable Carroll M. Blackwell

The section under consideration, Section 303.330, RSMo 1959, provides:

"Any person whose license or registration shall have been suspended as herein provided, or whose policy of insurance or bond, when required under this chapter, shall have been cancelled or terminated, or who shall neglect to furnish other proof upon request of the director shall immediately return his license and registration to the director. If any person shall fail to return to the director the license or registration as provided herein, the director shall forthwith direct the Missouri state highway patrol or any peace officer to secure possession thereof and return the same to the director."


We have already noted that a non-operating, joint owner is one whose registrations must be suspended under Section 303.030, Subsection 2, absent his compliance with the other provisions of the Safety Responsibility Law. Reading Section 303.330 with this in mind, there appears to be no question that a joint owner is a "person" as this term is used in this section; and, as such, he is amenable to the loss of his registration plates.

#### CONCLUSION

It is the opinion of this department that the Missouri State Highway Patrol or any peace officer, at the direction of the Director of Revenue, may secure the possession of the registration of a jointly owned vehicle where an operating joint-owner of a motor vehicle has caused the suspension of registration of such motor vehicle through violation of provisions of the Safety Responsibility Law.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Donald R. Wilson.

Very truly yours,

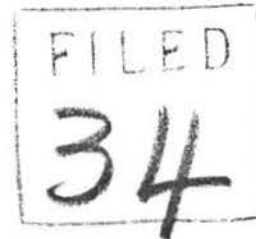
  
NORMAN H. ANDERSON  
Attorney General

ROADS AND STREETS: Money apportioned to Cass County as provided  
ROADS: by Article IV, Section 30 (a), Constitution  
STREETS: of Missouri, may not be expended on roads  
COUNTY COURTS: or streets under the jurisdiction or control  
of Belton, Missouri.

OPINION NO. 34 (1966)  
OPINION NO. 350 (1965)

March 17, 1966

Honorable Carl D. Gum  
Prosecuting Attorney  
Cass County  
Harrisonville, Missouri 64701



Dear Mr. Gum:

This is in answer to your request for an opinion reading as follows:

"I have been requested to ask you, 'whether or not a third class county can expend motor vehicle tax money within an incorporated city, town or village, under the provisions of Article 4, Section 3 (a)?'

"A situation has arisen because the city of Belton occupies practically the entire township, and an equal distribution of county funds to each township to be expended outside incorporated areas means that Mt. Pleasant Township, in which Belton is located, will have far more money per mile than other townships. City officers in Belton would, of course, like to have this money expended within the city limits.

"I have informed the city fathers that it is my opinion the money cannot be expended within incorporated areas. However, they requested that I write for an attorney general's opinion, which I am doing at this time. Thank you for your consideration in this matter."

Article IV, Section 30 (a), Constitution of Missouri, provides for a tax on motor vehicle fuel. This tax money, after deducting certain costs, "shall be apportioned between the counties, cities

Honorable Carl D. Gum

and the state." Subdivision (1) of Subsection 1 provides for the portion going to the counties and reads in part as follows:

"\* \* \*The funds credited to each county shall be used by the county solely for the construction, reconstruction, maintenance and repairs of roads, bridges and highways, and subject to such other provisions and restrictions as provided by law. In the absence of other controls provided by law, the state highway commission shall prescribe policy, rules and requirement for the expenditure of these funds by counties, including, among other things, highway commission approval of plans for projects on which the funds are to be used. In counties having the township form of county organization, the funds credited to such counties shall be expended solely under the control and supervision of the County Court, and shall not be expended by the various townships located within such counties. 'Rural land' as used in this section shall mean all land located within any county, except land in incorporated villages, towns, or cities."

Subdivision (2) of Subsection 1 provides for the portion going to the cities and reads in part as follows:

"Fifteen per cent of the remaining net proceeds shall be allocated to the various incorporated cities, towns and villages within the state having a population of more than two hundred according to the last preceding federal decennial census, solely for construction, reconstruction maintenance, repair, policing, signing, lighting and cleaning roads and streets and for the payment of principal and interest on indebtedness incurred prior to the effective date of this section on account of road and street purposes, and the use thereof being subject to such other provisions and restrictions as provided by law.\* \* \*"

Our search of the laws of Missouri has revealed no statute directing how or where the counties' portion of the money is to be expended. Therefore, as provided by the constitutional provision, the money apportioned to the counties shall be expended according to the rules and regulations of the State Highway Commission.

Honorable Carl D. Gum

Section 2 of the rules and regulations reads as follows:

"All money in the County Aid Road Trust Fund shall be expended for the construction, reconstruction, repair, and maintenance of roads and bridges in the County Road System as hereinafter provided."

Subsection (b) of Section 3 of the rules and regulations defines County Road System as:

"\* \* \*all public roads or highways in the county not under the jurisdiction or control of the State Highway Commission or any city, town, or village with a population of more than 200 persons according to the last official census."

According to the last official census Belton, Missouri, has a population of 4897. Therefore, the money apportioned to Cass County cannot be expended on roads or streets under the jurisdiction or control of Belton.

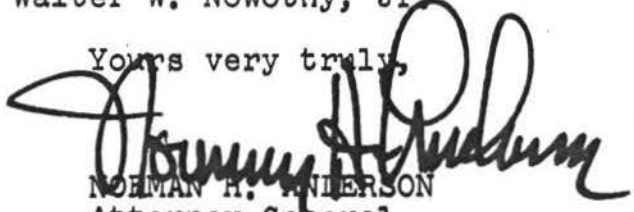
This rule and regulation is in keeping with the constitutional provision which allocates money separately to counties for "roads, bridges and highways" and to cities for "roads and streets".

#### CONCLUSION

It is the opinion of this office that money apportioned to Cass County as provided by Article IV, Section 30 (a), Constitution of Missouri, may not be expended on roads or streets under the jurisdiction or control of Belton, Missouri.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Walter W. Nowotny, Jr.

Yours very truly,

  
NORMAN H. ANDERSON  
Attorney General

June 22, 1966



OPINION NO. 357  
OPINION NO. 35  
Answered by Letter -  
Wilson

Honorable James E. Schaffner  
Acting State Purchasing Agent  
Office of State Purchasing Agent  
State of Missouri  
Jefferson City, Missouri

Dear Mr. Schaffner:

We have your opinion request, which states as follows:

"Since I have taken office in February we have opened twenty bids on rock salt, of which fifteen were tie bids, and five we could buy on low bid. As you are probably aware, the State Highway Department has investigated identical bids because of violation of anti-trust laws. In our case we report all such tie bids of \$2,000 or more to the Federal Attorney General, however, the bulk of ours, such as listed above, are of smaller dollar value and are not reported.

"We respectively request an opinion as to be advised if we should continually give awards to the same bidder in the event of tie bids, or secondly, should we rotate among the various bidders."

Honorable James E. Schaffner

Thus, the question presented is whether on identical bids for supplies of less than \$2,000 should the purchasing agent award the contract to the same bidder, or rotate the selection among the various identical bidders.

Section 34.040, RSMo 1959, provides in part:

"All purchases shall be based on competitive bids. . . On purchases where the estimated expenditure is less than two thousand dollars, bids shall be secured without advertising. In all cases, the purchasing agent shall post a notice of the proposed purchase on a bulletin board in his office . . . The contract shall be let to the lowest and best bidder. The purchasing agent shall have the right to reject any or all bids and advertise for new bids, or, with the approval of the governor, purchase the required supplies on the open market if they can be so purchased at a better price. . . The purchasing agent shall make rules governing the delivery, inspection, storage and distribution of all supplies so purchased and governing the manner in which all claims for supplies delivered shall be submitted, examined, approved and paid.\* \* \*"

Thus, this section provides an answer to the matter under inquiry. It gives you "the right to reject any or all bids and advertise for new bids. . ." Under this portion of the statute, we are of the view that you may determine in your discretion whether to continually contract with the same identical bidder, or rotate among bidders, or to reject all bids.

The topic of identical bidding is one which has recently been the subject of much discussion. The Department of Justice has made an analysis of its effects on public procurement, as well as the manners in which the different state and federal agencies have dealt with the problem. This report states:

"Identical bidding affects advertised public procurement most seriously when the identical bidders are in contention for the award of a contract. In this circumstance the purchasing agency is forced to resort to non-price criteria in making awards. . . In 1964, fifteen (\$15)



Honorable James E. Schaffner

million or thirty-five (35) percent of public purchases affected by identical bidding were awarded by lottery or by the use of criteria other than price.

"Federal agencies used non-price criteria to resolve tie bids in thirty percent of public purchases while State and local governments used such criteria in forty-nine percent of their purchases. Lottery, which was used by Federal agencies in eleven percent of tie bid procurements, was the most common method of resolving tie bid procurements. In addition, the Federal Government utilized other non-price tests to resolve 8.7 percent of its identical bid procurements. These criteria are designed to aid small business and to overcome labor surpluses.

"At the State and local levels lottery continues to be one of the principal methods used to resolve tie bids. Other methods, such as the split award whereby the procurement is divided equally among the tie bidders, or award to a different identical low bidder in each successive contract period on a rotational basis are used. Many of these techniques tend to foster the practice of identical bidding since the bidders are assured an equal or reasonable share of the public agency's business. In some instances agencies go so far as to permit identical bidders to decide among themselves which firm shall receive the contract."

Identical Bidding in Public Procurement, Fourth Report of the Attorney General under Executive Order 10936, October, 1965, p.15.

As the report indicates, many of these techniques tend to foster the practice of identical bidding. In an effort to combat this tendency, we submit for your consideration the suggestions contained in an earlier United States Attorney General's report, and recommended by the Anti-Trust Committee, National Association of Attorneys General and the Committee on Competition in Governmental purchasing, National Association of State Purchasing Officials.

Honorable James E. Schaffner

This report states:

"The United States Attorney General in his report on identical bidding in public procurement urged that greater flexibility be introduced into procedures for resolving equal low bids. Procurement officers should be encouraged to use their ingenuity to find the best methods for discouraging identical bidding where it exhibits a persistent pattern. The report suggests several procedures which have been used with some success:

- (a) where identical low bids include the cost of delivery, award the contract to the identical bidder farthest from the point of delivery;
- (b) award the contract to the identical bidder who received the previous award and continue to award succeeding contracts to the same bidder so long as all low bids are identical;
- (c) empower procurement officers to reject all bids and utilize negotiated procurement when identical low bids are submitted under sealed bidding procedure;
- (d) where identical bids result from resale price maintenance, combine within a single invitation both price controlled and non-price controlled items;
- (e) in the procurement of office and related equipment through dealers whose resale prices are frequently controlled by the manufacturers, require the bidders to offer allowances for old equipment to be traded as part of the transaction.

Honorable James E. Schaffner

"In addition to the above procedures, the following have proved of value in a number of cases:

- (f) if purchases by public agencies are subject to a Fair Trade law, endeavor to have the law amended to provide exemption;
- (g) include statements in bid invitations (1) regarding the inapplicability of the Robinson-Patman Act and, if so, the Fair Trade Laws, and (2) advising that identical bids will be reported to the Justice Department in accordance with the President's Executive Order 10936, and also to the State Attorney General;
- (h) reject all bids and seek to negotiate an agreement based upon issuing a 'blanket' type order for a large quantity (of estimated requirements) to be delivered when and as needed;
- (i) prevail upon bidders to seek relief from resale price maintenance policies which might stem from the central or main offices of their companies, and follow up by direct contact with their main offices;
- (j) give publicity to the matter where local producers or firms are involved.

\* \* \*

"Where identical prices cannot be broken, the following factors should be considered in de-

Honorable James E. Schaffner

termining the successful bidder; differences in product qualities; differences in delivery promises; differences in distribution and service facilities of the bidders; differences in past performances of the bidding firms; preferences which can be given to local or in-state firms and products."

Handbook for State Procurement Officials on Impediments to Competitive Bidding, the Council of State Governments, October, 1963, pp. 20-1.

As noted previously, we are of the view that you presently have the authority, suggested in "(c)" above, to reject all bids when identical low bids are submitted. And, with the approval of the Governor, you may purchase the required supplies on the open market if they can be purchased at a better price.

Of course, the suggestions under "(f)" and "(g)" above regarding Fair Trade laws have no application in Missouri.

In the event information comes to you indicating the existence of an agreement or understanding by the bidders to submit identical bids, this would be evidence of a conspiracy to violate the Missouri Anti-Trust Laws, ch. 416, RSMo 1959. Therefore, we request that you report any such information to this office for our evaluation.

In addition, we submit for your consideration an "Affidavit of Non-collusion." This affidavit requires the bidder to swear or affirm, under penalty, that he has reached the submitted bid unilaterally. Under the last quoted portion of Section 34.040, you are given the authority to make certain rules, governing purchasing.

Section 34.050, RSMo 1959, provides:

"The purchasing agent shall make and adopt such rules and regulations, not contrary to the provisions of this chapter, for the purchase of supplies and prescribing the purchasing policy of the state as may be necessary.\* \* \*"

We are of the opinion, that under these sections, you are authorized to promulgate a regulation requiring that an affidavit

Honorable James E. Schaffner

of non-collusion accompany all competitive bids.

We trust these suggestions will be of some assistance in enabling you to discourage these continued impediments to competitive bidding.

Very truly yours,

NORMAN H. ANDERSON  
Attorney General

DRW:fb

OFFICE OF STATE PURCHASING AGENT

AFFIDAVIT OF NON-COLLUSION

I hereby swear (or affirm) under the penalty for perjury:

(1) That I am the bidder (if the bidder is an individual), a partner in the bidder (if the bidder is a partnership), or an officer or employee of the bidding corporation having authority to sign on its behalf (if the bidder is a corporation);

(2) That the attached bid or bids have been arrived at by the bidder independently, and have been submitted without collusion with, and without any agreement, understanding, or planned common course of action with, any other vendor of materials, supplies, equipment or services described in the invitation to bid, designed to limit independent bidding or competition;

(3) That the contents of the bid or bids have not been communicated by the bidder or its employees or agents to any person not an employee or agent of the bidder or its surety on any bond furnished with the bid or bids, and will not be communicated to any such person prior to the official opening of the bid or bids; and

(4) That I have fully informed myself regarding the accuracy of the statements made in this affidavit.

Signed \_\_\_\_\_

Firm Name \_\_\_\_\_

Subscribed and sworn to before me  
this \_\_\_\_\_ day of \_\_\_\_\_, 196\_\_.

\_\_\_\_\_  
Notary Public  
My commission expires \_\_\_\_\_, 196\_\_.



INSURANCE:  
INSURANCE AGENTS:  
LICENSES:  
MUTUAL INSURANCE COMPANIES:

1) Agents of companies holding certificates of authority from Division of Insurance must be licensed.  
2) Certain mutual insurance companies must procure certificates of authority and agents of such companies must be licensed.  
3) Certain mutual insurance companies need not procure certificates of authority and agents of such companies need not be licensed.  
4) There are no "grandfather" exemptions from examination requirements for licensing of agents of mutual companies who were unlicensed agents prior to effective date of Sections 375.012 through 375.028, Cum. Supp.

OPINION NO. 40 (1966)  
382 (1965)

November 3, 1966

Honorable Robert D. Scharz  
Superintendent of Insurance  
Jefferson Building  
Jefferson City, Missouri

Dear Mr. Scharz:



I.

Reference is made to your request for a formal opinion from this office stated as follows:

"We hereby request your formal opinion interpreting Senate Bill No. 94 of the 73rd General Assembly, now Missouri Revised Statutes 375.010, et seq, as to whether the statute is meant to include agents of Fraternal Benefit Societies, § 378, and County, Town and Farmers' Mutual Property Insurance Companies § 380, and therefore encompassing all agents in this State selling all insurance or annuity contracts except those specifically mentioned in the statute.

We request this opinion as it would appear that the agents contemplated by the law as requiring a license include the agents of organizations under those latter two sections which negotiate, procure or make any insurance or annuity contract."

Prior to the enactment of Senate Bill No. 94 in 1965, agents for insurance companies were licensed pursuant to Section 375.010, RSMo. (All statutory references herein are to the Missouri Revised Statutes, 1959, as amended unless otherwise indicated.) Your office has informed this office that by the administrative interpretation of your office agents of Fraternal Benefit Societies, County Mutual Insurance Companies, Town Mutual Insurance Companies,

Honorable Robert D. Scharz

Farmers' Mutual Insurance Companies and Farmers' Mutual Property Insurance Companies were exempt from the application of Section 375.010. Your office considered such agents to be exempt by reason of statutes exempting the companies for which they acted as agents from the laws of this State applicable to other insurance companies, viz. Sections 378.020, 380.060, 380.290, 380.490 and 380.800. However, some Farmers' Mutual Property Insurance Companies, organized and operating pursuant to the provisions of Sections 380.580 to 380.840, requested that the agents of such companies be licensed pursuant to Section 375.010 (2), RSMo 1959, and licenses were issued to such agents by you pursuant to Section 375.010 (3), RSMo 1959. This office has not been informed as to why these companies requested that their agents be licensed or as to why you or your predecessors in office licensed such agents in view of the administrative interpretation by your office that such agents were exempt from the provisions of the Licensing Law.

Senate Bill No. 94 repealed Sections 375.010 and 375.020, and ten new Sections were enacted in lieu thereof. This office has analyzed the provisions of the old law together with the provisions of the new law from the point of view of determining any change in the scope of the law to insurance agents subject to the licensing provisions. Section 375.010, RSMo 1959, contained three numbered paragraphs. Paragraph 1 required insurance companies to procure a certificate of authority to do business in this State from the Superintendent of Insurance; paragraph 2 provided for the issuance of agents' licenses to persons upon the request of an authorized representative of such companies; and paragraph 3 authorized the agent licensed pursuant to paragraph 2 to act as agent for the company appointing him. Paragraph 2 of the cited statute was amended by Senate Bill No. 165 of the 71st General Assembly in 1963, and it appears in the Revised Statutes as Section 375.010 (2) Cum. Supp. 1963. The licensing procedure remained substantially the same with the inclusion of the specific requirements for a written application by the company requesting the issuance of the license and sworn answers to interrogatories by the prospective agent.

The new insurance agents' licensing law has been incorporated into the Revised Statutes as Sections 375.010, 375.012, 375.014, 375.016, 375.018, 375.021, 375.023, 375.025, 375.027 and 375.028, Cum. Supp. 1965. Former Sections 375.010 (1), RSMo 1959 and Cum. Supp. 1963, requiring insurance companies to procure certificates of authority from the Superintendent of Insurance, has been reenacted without any change whatsoever and appears in the new law as Section 375.010 Cum. Supp. 1965. Former Section 375.010 (3), RSMo, 1959 and Cum. Supp. 1963, has been reenacted without any change whatsoever as Section 375.021 Cum. Supp. 1965.

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As noted above, the licensing procedure for agents under the old law was provided in Section 375.010 (2), RSMo Cum. Supp. 1963. Under the procedure, application for the license was made by a company and such application was supported by sworn answers to interrogatories by the prospective licensee. The cited section has been repealed and new licensing procedures have been provided in lieu thereof by Section 375.018. Under the new procedures, written application under oath is made to the Superintendent directly by the prospective licensee; a certificate executed by an authorized representative of the company for whom the prospective licensee is to act must be filed with the Superintendent attesting to the applicant's competency and trustworthiness; and the applicant must submit to and pass a written examination conducted by the Superintendent. Thus, the procedural changes may be summarized as follows: Formerly application for an agent's license was made by the company for whom he would act as agent, whereas under the new law, application is made directly by the prospective licensee and certification of the applicant is made by the company; and formerly competency to act as an agent was determined by the applicant company, whereas under the new law, competency is determined by the Superintendent based upon a written examination.

The insurance agents' licensing law deals with three subjects: 1. Certificates of authority or licenses for insurance companies; 2. Licenses of agents for insurance companies; and 3. The relationship between licensed companies and licensed agents of such companies. The first Section (375.010) is, and has been for many years, the general provision which requires companies to have certificates of authority before engaging in the insurance business. The second Section (375.012) defines "insurance agent" in general terms. The third Section (375.014) forbids any person to act as an insurance agent unless he is licensed and forbids any insurance company to pay any commission or compensation to an unlicensed agent. The fourth Section (375.016) provides that a license shall authorize an agent to act on behalf of a company named in the license which is authorized to engage in the insurance business. The fifth Section (375.018) details the procedure for obtaining an agent's license and includes the requirement that an insurance company who licenses an agent shall pay an annual license fee of \$2.00. The sixth Section (375.021) is, and has been for many years, a provision authorizing a licensed agent to represent a particular company, requiring the company to pay the fee for the agent's license, requiring the company to furnish a list of its agents at the beginning of each licensed year and to keep such list up to date by advising the Superintendent as to terminations and address changes as they occur.

Thus, it appears that throughout the entire act the agents referred to are persons who are acting as agents on behalf of companies which hold certificates of authority to engage in the

Honorable Robert D. Scharz

insurance business in this State pursuant to the first Section of the act. The Supreme Court held in State v. Stone, 118 Mo. 388, 24 S.W. 164, that the provisions of the statutes for the licensing of companies and the provisions of the statutes for the licensing of agents were cognate legislation and must be construed together. Therefore, the conclusion follows that the insurance agents' licensing law is applicable only to those persons who act as agents for companies which hold certificates of authority to engage in the insurance business from the Superintendent of Insurance.

It has been noted earlier in this opinion that the interpretation by your office of many years standing has been that agents of Fraternal Benefit Societies, County Mutual Insurance Companies, Town Mutual Insurance Companies, Farmers' Mutual Insurance Companies and Farmers' Mutual Property Insurance Companies were exempt from the provisions of the agents' licensing law. This interpretation resulted from exemption statutes applicable to these various companies. Section 378.020, applicable to Fraternal Benefit Societies, is typical of these exemption statutes and provides as follows:

"Except as herein provided, such societies shall be governed by this chapter and shall be exempt from all provisions of the insurance laws of this state, not only in governmental relations with the state, but for every other purpose, and no law hereafter enacted shall apply to them, unless they be expressly designated therein."

Other exemption statutes and the companies to which they apply are as follows: Section 380.060, County Mutual Insurance Companies; Section 380.290, Town Mutual Insurance Companies; Section 380.490, Farmers' Mutual Insurance Companies; and Section 380.800, Farmers' Mutual Property Insurance Companies. It is noted that each of the exemptions referred to above is applicable to the company in regard to the provisions of other insurance laws. None of these exemption statutes has been construed by the courts in regard to the application of the insurance agents' licensing law to the agents of such companies. The exemption provisions have been construed to mean that the valued policy law, the statute fixing penalties for vexatious refusal to pay losses and the nonforfeiture provisions of the general life insurance law are not applicable to mutual companies. See Traders Mutual Fire Insurance Company v. Leggett, 284 S.W.2d 586, 1.c. 591.

The interpretation by your office, having been adopted and



Honorable Robert D. Scharz

adhered to for many years, is entitled to great weight in construing the statute. However, the interpretation of the statute by your department can only be invoked where the language of the statute is ambiguous or doubtful. State ex rel. National Life Insurance Co. of Montpelier Vt. v. Hyde, 292 Mo. 342, 241 S.W. 396, 1.c. 400. Guided by these principles, this office has examined the relationship between the agents' licensing law and the statutory provisions applicable to the insurance companies with exemption statutes referred to above.

The legislature has enacted comprehensive statutory provisions covering the entire field of insurance. Chapter 374 established the Division of Insurance, provided for the appointment of the Superintendent and made provision for the internal administration of the agency. Chapter 375 enacted provisions applicable to all insurance companies. Chapter 376 enacted specific provisions concerning life and accident insurance. Chapter 377 enacted provisions for assessment plan and stipulated premium plan life insurance. Chapter 378 enacted specific provisions concerning Fraternal Benefit Societies. Chapter 379 enacted specific provisions in regard to insurance other than life. Chapter 380 enacted specific provisions in regard to County, Town, Farmers' Mutual Insurance Companies and Farmers' Mutual Property Insurance Companies. Chapter 381 enacted specific provisions in regard to title insurance.

Section 375.010 is a general statutory mandate prohibiting any company from transacting any insurance business in this State unless it procures a certificate of authority from the Superintendent of the Insurance Division authorizing it to do an insurance business. The specific statutory requirements for a certificate of authority are found in the other statutory provisions applicable to particular kinds of insurance companies. Provisions in regard to the issuance of a certificate of authority to a joint stock life and accident insurance company are set forth in Section 376.090. Provisions applicable to the issuance of a certificate of authority to mutual life and accident insurance companies are found in Section 376.130. The renewal of certificates of authority by life and accident insurance companies is provided for by Section 376.470. Certificates of authority to industrial and prudential insurance companies is provided for by Section 376.730.

Specific statutory provisions in regard to certificates of authority for other insurance companies are as follows: Assessment plan life insurance companies, Sections 377.040 and 377.140; joint stock companies for insurance other than life, Section 379.055; mutual fire and marine companies, Section 379.075; mutual companies other than life and fire, Section 379.235; and certificates of authority for companies other than life upon reorganization, Sections 379.555 and 379.625. All of the companies referred to above are subject to the general insurance laws, and the specific statutory provisions for certificates of authority relate

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back to the general provision concerning certificates of authority set forth in Section 375.010.

An examination of the specific statutory provisions relating to insurance companies with statutory exemptions from the general insurance laws reflects that the following companies are required to procure a certificate of authority from the Superintendent of Insurance before commencing business and are required to renew such certificates of authority with the Superintendent of Insurance annually: Fraternal Benefit Societies, Sections 378.050 and 378.150; Town Mutual Insurance Companies, Section 380.300; and Farmers' Mutual Property Insurance Companies, Section 380.590. The statutes do not require County Mutual Insurance Companies and Farmers' Mutual Insurance Companies to procure certificates of authority from the Superintendent of Insurance.

It is a cardinal rule of statutory construction that statutes in pari materia are to be construed together and no one section or portion of all the sections is to be singled apart for consideration from all other sections; *Fleming v. Moore Bros. Realty Co.*, 251 S.W.2d 8. Furthermore, all provisions of the law on the same subject matter should be construed together in harmony so as to work out and accomplish the central idea and intent of the legislature; *In Re McArthur's Estate*, 207 S.W.2d 546. Section 375.010 is a general statute in regard to the issuance of certificates of authority to insurance companies. The same subject matter is the object of specific legislation for particular insurance companies in Chapters 376, 377, 378, 379 and 380. The statutory provisions are in pari materia and must be construed together.

It has been concluded that all agents of insurance companies which hold certificates of authority from the Superintendent of Insurance are subject to the provisions of the agents' licensing law. The statutory provisions in this regard are clear and unambiguous. Therefore, the administrative interpretation by your office exempting the agents of certain companies who hold certificates of authority from your Department from the provisions of the agents' licensing law is erroneous. No exemption has been made for agents of Fraternal Benefit Societies, Town Mutual Insurance Companies and Farmers' Mutual Property Insurance Companies. These companies are all required to procure certificates of authority from the Superintendent of Insurance. Therefore, agents for these companies are subject to the provisions of the agents' licensing law.

This conclusion is consistent with *City of Boonville v. Teters*, 112 S.W.2d 82, 1.c. 83 and 84, wherein the court stated as follows:

"The fact that the provisions of chapter 37



Honorable Robert D. Scharz

do not apply to mutual insurance companies cannot be interpreted to mean that mutual companies are not insurance companies and that the agents of mutual companies are not insurance agents."

Further support for this conclusion is found in *City of Cape Girardeau v. Comer*, 119 S.W.2d 1005, wherein the court concluded that an insurance company and its agent are not one and the same person and immunity to the company does not extend to the agent.

## II.

You have made a supplemental request to the questions raised under I, *supra*, stated as follows:

"If it is the opinion of your office that Senate Bill 94 does include agents of Fraternal Benefit Societies, and County, Town, and Farmers Mutual Insurance companies, then we would like an opinion as to whether or not agents of the above companies who had been selling insurance prior to the effective date of the new law would have to be licensed and submit to the written examination. This question arises because of the fact that prior to the effective date these agents were not licensed by this Division or any other state agency."

Your request assumes that the law did not require agents of Fraternal Benefit Societies and County, Town and Farmers' Mutual Insurance Companies to be licensed prior to the effective date of Senate Bill 94. This office has concluded under I, *supra*, that agents of Fraternal Benefit Societies, Town Mutual Insurance Companies, and Farmers' Mutual Property Insurance Companies were required to be licensed under the former agents' licensing provisions of the statutes and that the administrative interpretation by your office that such agents were exempt from the licensing provisions of the statutes is erroneous. This office has also concluded that the agents of County Mutual Insurance Companies and Farmers' Mutual Insurance Companies were not required to be licensed under the former law and are not required to be licensed under Senate Bill 94.

Interested parties have submitted memoranda for the consideration of this office in which arguments are developed that agents of such insurance companies who have not been licensed in the past can be licensed under the new law without the requirement of submission to written examinations. It is contended that to

Honorable Robert D. Scharz

require an examination before licensing such agents would be unconstitutional in violation of the due process clauses of the United States Constitution and the Missouri Constitution, the equal protection of the laws clause of the United States Constitution and Federal and State constitutional provisions prohibiting the impairment of the obligation of contracts and laws which are retrospective in operation. These memoranda assume that such agents were operating lawfully when Senate Bill 94 was enacted. As noted above, this is an erroneous assumption. Therefore, the arguments advanced by these memoranda are not of significance in consideration of the question which you have raised.

Section 375.018, RSMo Cum. Supp. 1965, provides exceptions from the examination requirement as follows:

- "4. No examination shall be required of
- (1) Applicants for the timely annual renewal of a license;
  - (2) Applicants for a license covering the same kind or kinds of insurance business as to which the applicant is currently licensed, or was licensed in this state within the six months preceding the date of application, other than a temporary license under section 375.027;
  - (3) An applicant who is a ticket selling agent or representative of a common carrier or other company who acts as an insurance agent only in reference to the issuance of insurance contracts primarily for covering the risk of travel;
  - (4) An applicant who holds a current license in another state which requires a written examination satisfactory to the superintendent;
  - (5) An applicant who is an owner of an individually owned business, his employee, or an officer or employee of a partnership or corporation who solicits, negotiates or procures credit life, accident and health or property insurance in connection with a loan or a retail time sale transaction made by the corporation, partnership, or individual business, or in a business in which

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there is conducted wholly or partly retail installment transactions under chapter 365, RSMo;

(6) Any person who is licensed as an agent upon October 13, 1965;

(7) Any person, firm or corporation selling title insurance."

Subparagraphs (1) and (2) are "grandfather provisions" which are applicable to agents who were licensed prior to the enactment of Senate Bill 94. No examination is required for the renewal of the licenses of such agents. These exemption provisions have no application to agents who were not licensed prior to the enactment of Senate Bill 94. Even though agents of certain companies were not required to be licensed by your office through an erroneous interpretation of the law, the grandfather provisions referred to cannot be construed to permit the licensing of such agents without requiring an examination.

Research by this office has not disclosed cases in regard to fact situations analogous to the question under consideration. In *McClellan v. Kansas City*, 379 S.W.2d 500, the Supreme Court en banc discussed many principles applicable to the licensing powers of the State and municipalities as political subdivisions thereof. The principles discussed include questions of discrimination and the validity of grandfather clauses which give credit to prior experience in the examination of prospective licensees. *City of St. Louis v. F. Meyrose Lamp-Manuf's Co.*, 41 S.W. 244, 1.c. 245, summarizes cases upholding examination requirements for the licensing of numerous businesses and professions. The conclusions reached in this opinion are consistent with the principles developed in the referenced cases.

#### CONCLUSIONS

All agents of insurance companies which are required to procure certificates of authority to do business from the Superintendent of Insurance must be licensed by the Division of Insurance. Fraternal Benefit Societies, Town Mutual Insurance Companies and Farmers' Mutual Property Insurance Companies are required to procure certificates of authority from the Superintendent of Insurance. Therefore, agents of these companies must be licensed by the Division of Insurance. County Mutual Insurance Companies and Farmers' Mutual Insurance Companies are not required to procure certificates of authority to do business from the Superintendent of Insurance, and therefore, the agents of these companies are not required to be licensed by the Division of Insurance.

Agents of Fraternal Benefit Societies, Town Mutual Insurance Companies, and Farmers' Mutual Property Insurance Companies

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who were acting as such agents prior to the enactment of Senate Bill 94 (Sections 375.012 through 375.028, Cum. Supp. 1965) but who were not licensed by the Superintendent of the Division of Insurance are not exempt from the written examination requirement of the statutes pursuant to Section 375.018-4(1), (2) or (6).

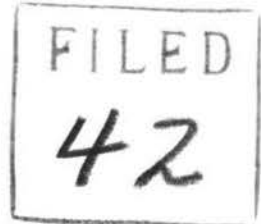
The foregoing opinion, which I hereby approve, was prepared by my Assistant, Thomas J. Downey.

Yours very truly,

A handwritten signature in dark ink, appearing to read "Norman H. Anderson", written in a cursive style.

NORMAN H. ANDERSON  
Attorney General

February 1, 1966



Colonel E. I. Hockaday  
Superintendent  
Missouri Highway Patrol  
Jefferson City, Missouri

Dear Colonel Hockaday:

In answer to your recent opinion request relating to the permissible length of motor vehicles operated upon the highways of this state, we enclose herewith a copy of Opinion no. 52 (1966) - 410 (1965) dated February 1, 1966, to Robert L. Hyder.

I believe this will answer the questions presented in your request.

Yours very truly,

NORMAN H. ANDERSON  
Attorney General

By  
J. Gordon Siddens  
Assistant Attorney General

Enclosure

MOTOR VEHICLES: Farm tractors are required by Section 304.010 to  
FARM VEHICLES: be operated at a minimum speed of 40 miles per hour  
on interstate highways.

OPINION NO. 44

June 16, 1966



Colonel E. I. Hockaday  
Missouri State Highway Patrol  
Jefferson City, Missouri

Dear Colonel Hockaday:

Your department has requested the opinion of this office on the following legal question:

Is the term "vehicle", as used in Section 304.010, subsection 4, RSMo Cum. Supp. 1965, providing for minimum speed of vehicles being operated on Federal interstate highways, applicable to farm machinery.

You have informed this office that your interest in this regard is limited to farm tractors.

Subsection 4 of Section 304.010, RSMo Cum. Supp. 1965, provides:

"On any divided highway designated as part of the federal interstate system, no vehicle shall be operated at a speed of less than forty miles per hour, except when a slower speed is required for safe operation of the vehicle because of weather or other special conditions."

Section 304.260, RSMo 1959, provides in part:

"Farm tractors when using the highways in traveling from one field or farm to another, or to or from places of delivery or repair are exempt from the provisions of the law relating to registration and display of number plates, but shall comply with all the other provisions hereof."

The Supreme Court of Missouri, in State v. Powell, 306 SW 2d 531, stated:



Colonel E. I. Hockaday

". . . Unless the statutes pertaining to the regulation, taxing, and licensing of motor vehicles expressly exclude or exempt farm tractors therefrom, they are included because farm tractors are motor vehicles. Webster's New International Dictionary (2d. Ed.) gives a definition of 'tractor' as 'An automotive vehicle used for drawing or hauling something, as a vehicle, plow, harrow, or reaper.'

\* \* \* \* \*

"Defendant argues that there is no section in Chapter 564 which defines motor vehicle; that, therefore, the definition of motor vehicles must be found elsewhere. Defendant then cites to us Sec. 301.010 (15) and Sec. 303.020 (5). Chapter 301 governs the registration and licensing of motor vehicles and outboard motors. Sec. 301.010 (15) of that chapter defines 'motor vehicle' as 'any self-propelled vehicle not operated exclusively upon tracks, except farm tractors.' Chapter 303 is designated as 'Motor Vehicle Safety Responsibility Law.' Section 303.020 (5) exempts farm tractors from the definition of 'motor vehicles' for the purposes of registration and licensing. The legislature evidently understood that unless farm tractors were expressly exempted from the provisions of Chapter 301 and 303 such tractors would come within the term 'motor vehicle.' It is also evident that the legislature did not intend that farmers should be required to purchase license plates for farm tractors and that such tractors should also be exempt from the provisions of the Safety Responsibility Law. There is good reason for such an exemption; farm tractors are used primarily in the fields for the purpose of cultivating and reaping crops. However, farm tractors come with the provisions of the laws governing safety. This is made evident by Chapter 304 which is entitled 'Traffic and Equipment Regulation.' . . .

\* \* \* \* \*

"The fact that the legislature expressly exempted farm tractors in Chapters 301 and 303 tends to support the theory that farm tractors come within the definition of 'motor vehicle.' If that were not so, then the exemption would be entirely unnecessary. We rule that farm tractors do come within the term 'motor vehicle.'"

Colonel E. I. Hockaday

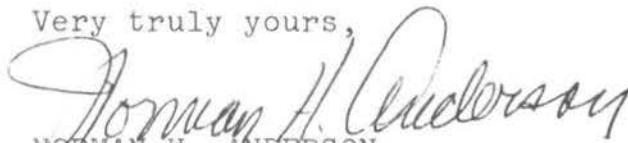
Thus, under Section 304.260, RSMo 1959, and State v. Powell, supra, we conclude that a farm tractor is a vehicle subject to the minimum speed requirements of Section 304.010, subsection 4, RSMo Cum. Supp. 1965.

CONCLUSION

It is the opinion of this office that farm tractors are required by Section 304.010 to be operated at a minimum speed of 40 miles per hour on interstate highways.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Donald R. Wilson.

Very truly yours,



NORMAN H. ANDERSON  
Attorney General

UNIFORM COMMERCIAL CODE:  
SECRETARY OF STATE:  
RECORDER OF DEEDS:  
PUBLIC RECORDS:

Pursuant to the authority of Section 400.9-407, RSMo Cum. Supp. 1965, county recorder of deeds shall conduct lien searches when requested to do so by nonstandard forms even though the Secretary of State has approved Missouri Uniform Commercial Code Form UCC-11 for such use.

September 22, 1966

OPINION NO. 48 (1966)  
OPINION NO. 401 (1965)

Honorable William G. McCaffree  
Prosecuting Attorney  
Vernon County  
Nevada, Missouri



Dear Mr. McCaffree:

This is in reply to your opinion request in which you stated that some recorders of deeds were refusing to conduct lien searches requested by the Farmers Home Administration on their Form FHA 440-13. You further stated that the recorders were basing their refusal to accept the FHA form on information found on page 26 of the Uniform Commercial Code Manual published by the Secretary of State and compiled in cooperation with the Missouri Bar Association. You emphasized in your letter, the language on page 26, supra, which states:

"When requesting copies of statements or other information from the Office of the Secretary of State or Recorders of Deeds, all interested parties are urged to use the Request for Copies or Information Form (Form UCC-11) illustrated on page 63 of the Appendix of Forms. This form was adapted for use in Missouri from the Standard Form (Form UCC-11), which is being used in other states where the Code is now in effect."

It does not exclude the use of Form FHA 440-13.

Whether Form FHA 440-13 may be used in lieu of UCC-11 depends upon statutory provisions. Section 400.9-101 through 400.9-507, RSMo Cum. Supp. 1965, applies to secured transactions wherein the

Honorable William G. McCaffree

collateral is both personal and fixtures (Section 400.9-102). It should be noted that a security interest in real property is excluded from Article 9, except as to fixtures attached thereto (Section 400.9-104 (j)).

A duty is placed upon the recorder of deeds by Section 400.9-407, RSMo Cum. Supp. 1965, to do certain things upon request. That section states in part:

"(2) Upon request of any person, the filing officer shall issue his certificate showing whether there is on file on the date and hour stated therein, any presently effective financing statement naming a particular debtor and any statement of assignment thereof and if there is, giving the date and hour of filing of each such statement and the names and addresses of each secured party therein. The uniform fee for such a certificate shall be one dollar plus fifty cents for each financing statement and for each statement of assignment reported therein. \* \* \*"

For the purposes of this opinion, the following language of paragraph (2), supra, should be emphasized: "Upon request of any person, the filing officer shall \* \* \*." It is clear from the above language that when "any person," which unquestionably includes the FHA or the U. S. Department of Agriculture, makes a request it is then mandatorily incumbent upon the filing officer to respond as statutorily directed by paragraph (2), supra. "Shall," as found in the above emphasized sentence quoted from paragraph (2), supra, should be interpreted as mandatory (Uniform Commercial Code, 1962 Official Text, Comments, page #711), which is consistent with the general rules of statutory interpretation.

The recorder of deeds does have a mandatory duty as imposed by that section.

It is our view that any request made for such information, whether in longhand or in a typed letter, would be a perfectly valid request and would have to be answered by the filing officer as would a request made on the FHA Form 440-13.

Honorable William G. McCaffree

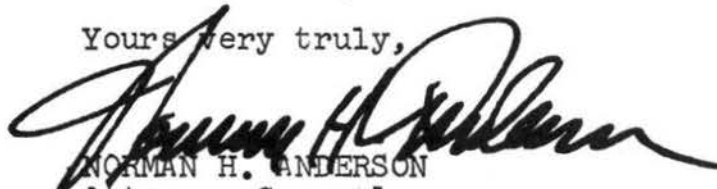
Of course, under Section 400.9-407, RSMo Cum. Supp. 1965, the duty is placed upon the filing officer to furnish the information provided for and he is not required to give any other information than that provided for in such section.

CONCLUSION

It is therefore the opinion of this office that a county recorder of deeds is a filing officer within the meaning of Section 400.9-407, RSMo Cum. Supp. 1965, if that office is a proper place to file to perfect a security interest pursuant to Section 400.9-401, RSMo Cum. Supp. 1965. It is the further opinion of this office that a county recorder of deeds, as a filing officer, must accept requests for information on forms other than UCC-11 of Missouri and furnish the information provided for under Section 400.9-407, RSMo Cum. Supp. 1965. However, there is no duty upon the recorder of deeds to furnish information other than that provided for in such section.

The foregoing opinion, which I hereby approve, was prepared by my assistant, J. Max Price.

Yours very truly,



NORMAN H. ANDERSON  
Attorney General

Enclosures

SECRETARY OF STATE: Photocopies of a security agreement or  
UNIFORM COMMERCIAL CODE: financing statement containing the  
PHOTOCOPIES: photocopied signatures of both parties  
SIGNATURES: is entitled to be filed of record pro-  
FILING: viding it meets all the other require-  
ments of the Code and the proper fee  
is tendered. The Secretary of State should accept all instru-  
ments for filing where the instrument meets the formal require-  
ments of the Code and administratively reject those that do not  
meet the requirements of the Code.

Opinion No. 49 (1966)  
Opinion No. 402 (1965)

January 12, 1966



Honorable James C. Kirkpatrick  
Secretary of State  
Jefferson City, Missouri

Dear Mr. Kirkpatrick:

This opinion is in response to your inquiry whether a photo-  
copy of a security agreement or financing statement containing  
the photocopied signatures of both parties is entitled to be  
filed of record in your office when tested by the requirements  
of Section 400.9-402(1), RSMo Cum. Supp. 1965?

The pertinent statutes are:

(1) Section 400.9-402(1), RSMo Cum. Supp. 1965 -

"A financing statement is sufficient if it  
is signed by the debtor and the secured party,  
gives an address of the secured party from  
which information concerning the security  
interest may be obtained, gives a mailing  
address of the debtor and contains a state-  
ment indicating the types, or describing the  
items, of collateral. A financing statement  
may be filed before a security agreement is  
made or a security interest otherwise attaches.  
When the financing statement covers crops  
growing or to be grown or goods which are or  
are to become fixtures, the statement must also  
contain a description of the real estate con-  
cerned and if fixtures, also the name of the  
record owner. A copy of the security agreement  
is sufficient as a financing statement if it



Honorable James C. Kirkpatrick

contains the above information and is signed by both parties. Without limiting the generality of the preceding sentence, any financing or other statement or security agreement filed pursuant to part 4 of article 9 which contains a copy, however made, of the signature of a secured party or his representative or of the debtor or of his representative is 'signed' by the secured party or the debtor as the case may be."

(Underscoring added)

Section 400.1-201(39), RSMo Cum. Supp. 1965, reads as follows:

"'Signed' includes any symbol executed or adopted by a party with present intention to authenticate a writing."

This office assumes for the purpose of this opinion that the instrument offered meets all the other formal requirements of the Uniform Commercial Code and in particular, Section 400.9-402(1), as amended.

The question is generated by the language of the amendment which is the underscored portion of the Section (supra).

Certainly, legislators are not presumed to have intended a useless act. (Gross v. Merchants-Produce Bank, 390 S.W. 2d 591). Courts favor a construction of statutes which harmonizes with reason and which avoids an unjust, absurd, unreasonable or oppressive result. (Trio Mobile Home Park Inc., v. City of St. Charles, 390 S.W. 2d 432). In construing a statute, words should be given their plain and ordinary meaning to promote its object and purpose. (Julian v. Mayor et al, 391 S.W. 2d 864). We should first seek the lawmakers intention for the whole act; and, if possible, to effectuate that intention (Kirkwood Drug Co. v. City of Kirkwood, 387 S.W. 2d 550; Julian v. Mayor et al, supra).

In examining this section (supra) and considering statutes of other states, we find Section 1-201(39) McKinney's Consolidated Laws of New York, Annotated, Book 62 1/2 Part I, Uniform Commercial Code, reads as follows:

Honorable James C. Kirkpatrick

"'Signed' includes any symbol executed or adopted by a party with present intention to authenticate a writing. Without limiting the generality of the preceding sentence, any financing or other statement or security agreement filed pursuant to part 4 of article 9 which contains a copy, however made, of the signature of a secured party or his representative, or of a debtor or his representative, is 'signed' by the secured party or the debtor, as the case may be."

Had the Missouri Legislature added the language of the amendment to Section 400.1-201(39), *supra*, the statutes of New York and Missouri would be identical. Instead, the legislature tacked the amendment to Section 400.9-402(1) as set out above. As a consequence, the initial clause of the amendment does not appear germane and is possibly out of context. Read without this clause, the amendment is as follows:

"Any financing or other statement or security agreement filed pursuant to part 4 of article 9 which contains a copy, however made, of the signature of a secured party or his representative or of the debtor or of his representative is 'signed' by the secured party or the debtor as the case may be."

If the amendment is read as above (disregarding the initial phrase) we believe the amendment to be a special statute having as its meaning a limited, special definition of the word "signed" when applied to "statements or agreements filed pursuant to part 4 of article 9." Section 400.1-201(39), *supra*, is a "general statute." The definition of "signed" found in Section 400.1-201(39) applies to all other sections of the Uniform Commercial Code except that portion of part 4, article 9 as specially amended. Thus, the term "signed" is enlarged in its meaning in Article 9.

It is a familiar rule of statutory construction that special statutes prevail over general statutes on the same subject. Thus, the Springfield Court of Appeals stated in *City of Poplar Bluff v. Poplar Bluff Loan and Building Association*, 369 S.W. 2d 764, 767 has stated the rule as follows:

"[6] Where there is one statute dealing with a

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subject in general and comprehensive terms and another dealing with a part of the same subject in a more minute and definite way, the two should be read together and harmonized, if possible, with a view to giving effect to a consistent legislative policy; but, to the extent of any necessary repugnancy between them, the special will prevail over the general statute. Where the special statute is later, it will be regarded as an exception to, or qualification of, the prior general one; and where the general act is later, the special will be construed as remaining an exception to its terms, unless it is repealed in express words or by necessary implication."

See also *Veal v. City of St. Louis*, 289 S.W. 2d 7, 12.

Binder's Uniform Commercial Code Service (Hart & Willier)  
§ 91A.11 p. 9-70 states as follows:

"The second and third alternatives raise obvious legal questions. There is no reason why a reproduction--photostatic copy, xerox, etc., -- is not within the terms 'copy of the security agreement.' But is it signed? The answer must be 'yes.' The security agreement is signed, and a copy may serve as a financing statement. The requirements of a financing statement are not those of a statute of frauds, as they are for a security agreement; the notice concept is amply served. Nothing is gained by an overly technical construction of the financing statement requirements and, indeed, the Code's overriding goal to simplify, modernize and clarify the law of commercial transactions is imperative upon courts. See § 12.03[2]. Of course, whether a filing officer will agree when presented with a reproduction is another matter. See Section 91A.14."

In our opinion, the amendment *supra*, extends the provisions of the original act by allowing a permanent copy to be made which, can be filed under the provisions of the amended section (*supra*) provided there is some form of authentication. The photocopy of the signatures of the debtor and secured party

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provide this.

The mischief that could arise from allowing the filing of a financing statement and/or security agreement that has not been authenticated by the debtor in some fashion is obvious. It is the debtors "signature" that substantially decreases the possibility of fraudulent filing, viz., a "secured party" deliberately filing without authorization to interfere or create a false impression or the possibility of an erroneous description of the collateral.

We conclude, therefore, that a permanent type photocopy of a financing statement or security agreement that contains the signatures of both the debtor and secured party constitutes an "authenticated" copy within the meaning of the statute.

Implicit in your original problem is the question of authority for your office to administratively reject any instrument offered for filing that does not meet the formal requirements of the Code. The requirements we speak of are found in Section 400.9-402, et seq. RSMo Cum. Supp., 1965, as amended. Without belaboring the point further, a casual reading of the pertinent statutes should spell them out for you.

The Secretary of State in our opinion can properly reject an offered instrument that does not meet substantially the formal requirements of the Code. The court, in its opinion in *In Re Smith*, (U.S. District Court Pa. -- 1962) 205 F. Supp. 27, 29, stated:

"\* \* \* That section also provides in subsection 5 that a financing statement 'substantially complying' with the requirements of the section is effective. We think that a financing statement which does not contain the debtor's address does not substantially comply with the formal requirements of the Code. Therefore, the filing officer in the Secretary's office had the right to return the conditional sales contract to the petitioner, and it was incumbent upon petitioner to resubmit a statement which contained the debtor's address.

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"[2,3] Our interpretation of section 9-403(1) is that it refers to the presentation for filing of a financing statement which substantially complies with the Code's formal requirements for financing statements, and one which the filing officer would, therefore, be dutybound to accept."

Accordingly, we conclude that the Secretary of State, or his delegate, has a duty to accept for filing all instruments that meet the formal requirements of the Uniform Commercial Code as expressed in the statutes (supra) and to reject any that does not.

It is emphasized these conclusions are very broad in scope and have as their purpose the promulgation of general guidelines. A caveat is urged to the effect that the eligibility for filing of a particular instrument is a separate, specific question that must be determined on the facts in each particular instance. There is no formula to answer all of the questions on this subject.

#### CONCLUSION

It is the opinion of this office that:

1. A permanent photocopy of a financing statement or security agreement containing photocopied signatures of the debtor and secured party is entitled to be filed as a financing statement in the office of the Secretary of State providing such instrument meets all other formal requirements of the Uniform Commercial Code under Section 400.9-402, RSMo Cum. Supp. 1965.

2. That the Secretary of State or his delegate has a duty to accept for filing all instruments as financing statements that meet the formal requirements of the Uniform Commercial Code set out in Section 400.9-402 (supra) providing the appropriate filing fee is tendered.

3. Those instruments offered as financing statements that do not meet the formal requirements of Section 400.9-402 (supra) should be rejected.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Richard C. Ashby.

Yours very truly,  
  
NORMAN H. ANDERSON  
Attorney General

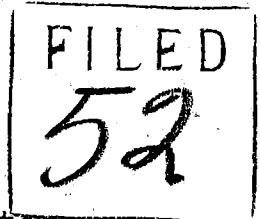
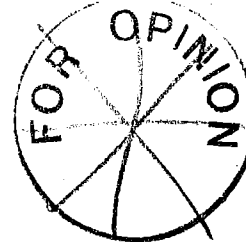
MOTOR VEHICLES:  
TRUCKS:  
FREIGHT TRANSPORT  
MOTOR VEHICLES:  
HIGHWAY DEPARTMENT:  
DRIVEAWAY OPERATION:

1. Freight transport motor vehicles are limited by Sec. 304.170 RS Cum Sup 1965 to the lengths herein explained.
2. The combination of vehicles referred to in Fig. 6 is not a "driveaway operation".
3. The authority of the Highway Commission under Sec. 304.170 RS Cum Supp 1965 is limited to designating highways on which vehicles not to exceed 65 feet may operate.

February 1, 1966

Honorable Robert L. Hyder  
Chief Counsel  
Missouri State Highway Commission  
Jefferson City, Missouri

OPINION NO. 52 (1966)  
410 (1965)



Dear Mr. Hyder:

This opinion is in response to your request relating to the permissible length of motor vehicles operated upon the highways of this state and other questions herein discussed.

Section 304.170, Revised Statutes of Missouri 1965 Cumulative Supplement, relating to length provides in part as follows:

"3. No single motor vehicle operated upon the highways of this state shall have a length, including load, in excess of forty feet.

\* \* \* \* \*

5. No combination of truck-tractor and semi-trailer operated upon the highways of this state shall have a length, including load, in excess of fifty-five feet, except that such a combination specially designed to transport motor vehicles may itself have a length, including load, of sixty feet.

6. No other combination of vehicles operated upon the highways of this state shall have an overall length, unladen or with load, in excess of sixty-five feet on highways designated by the state highway commission or in excess of fifty-five feet on any other highway."

It is to be noted that the language of this section deals primarily with "vehicles" and "motor vehicles". There is also used however, the term "truck-tractor" and the term "semitrailer".



Honorable Robert L. Hyder

It is nevertheless well known that the purpose and object of the legislature in this section was to regulate the length of freight transport trucks in this state.

Section 301.010, RSMo 1959, defines the term tractor as follows:

"Tractor", any motor vehicle, designed primarily for agricultural use or used as a traveling power plant or for drawing other vehicles or farm or road building implements and having no provision for carrying loads independently;"

This section also defines the term trailer as follows:

"Trailer", any vehicle without motive power designed for carrying property or passengers on its own structure and for being drawn by self-propelled vehicle, except those running exclusively on tracks, including a semi-trailer or vehicle of the trailer type so designed and used in conjunction with a self-propelled vehicle that a considerable part of its own weight rests upon and is carried by the towing vehicle;"

Nowhere, however, in our statutes are we able to find a definition of the term "truck-tractor".

Because we have experienced difficulty in describing the various types of vehicles involved in this inquiry and the regulations applicable to them, we have resorted to rough schematic drawings which are attached hereto as an exhibit, so that our descriptions and meanings are made more certain.

Figure 1 represents a "truck" or as it is sometimes referred to a "straight truck". Figure 2 represents a "tractor" as that term is most commonly understood in the trade of motor vehicles commonly used to transport freight. Figure 3 represents a "tractor and semi-trailer" as that term is generally understood in the trade (not designed to transport motor vehicles). Figure 4 represents a "tractor and semi-trailer" together with a "trailer". Figure 5 represents a "tractor and semi-trailer" designed to transport motor vehicles. Figure 6 represents two

Honorable Robert L. Hyder

"straight trucks", the one pulling the other designed to transport motor vehicles.

It is clear that the motor vehicles represented by Figure 1 and Figure 2 fall within the category described in Paragraph 3 of Section 304.170, and hence the length is limited to forty feet.

The problem becomes more difficult in the construction of Paragraphs 5 and 6. It is our view that the trade has an understanding of the meaning of "truck" also a clear understanding of "tractor" and "semi-trailer", but we are unable to determine from the statutes what is meant by the use of "truck tractor and semi-trailer". We believe that this may be inadvertent language because it seemingly can only apply to the situation of a "tractor with semitrailer". We believe that the understanding in the trade is that a "truck-tractor and semitrailer" means the same as "tractor and semi-trailer". Under Paragraph 5 the length of vehicles on the highways is limited to fifty-five feet, except those designed to transport motor vehicles. We therefore conclude that maximum length for vehicles of the type in Figure 3 is fifty-five feet.

The exception clause of Paragraph 5 relates to a combination especially designed for transporting motor vehicles. It is also to be noted that in the exception clause the use of the words "such a combination" must be deemed to relate back directly to "truck tractor and semitrailer" and this specifies that the maximum length shall be sixty feet for such vehicles. We therefore conclude that the vehicles represented in Figure 5 are limited to a maximum length of sixty feet.

You have next inquired about a type of vehicle which is represented in Figure 4 which is a tractor with semitrailer and in addition thereto a trailer towed behind the semitrailer. It is our view that Paragraph 6 of Section 304.170 is applicable to the situation. This paragraph commences with the words "no other combination of vehicles", this language has reference to the combination of vehicles referred to in Paragraph 5, and Paragraph 6 authorizes a combination of vehicles on the highways having an overall length of sixty-five feet when such highways have been so designated by the State Highway Commission. However, the type of vehicle represented in Figure 4 may not have a length in excess of fifty-five feet on any other highway.

Honorable Robert L. Hyder

This now leads us to the situation which has been presented to us as representing Figure 6 which involves one straight truck towing another straight truck both of which trucks are designed for the transport of other vehicles. We conclude that Paragraph 6 is applicable to this situation and authorizes the overall length of such a combination of vehicles to be fifty five feet on the highways of this state except that such a combination of vehicles may not exceed sixty-five feet on highways designated by the State Highway Commission.

The question has been asked whether the combination of vehicles in Figure 6 is a "driveaway operation".

Section 301.010(4) V.A.M.S. 1959, defines a "driveaway operation" as follows:

"(4) 'Driveaway operation' means the movement of a motor vehicle by any person or motor carrier other than a dealer over any public highway, under its own power singly, or in a fixed combination of two or more vehicles, for the purpose of delivery for sale or for delivery either before or after sale." (Underscoring added)

Section 301.060(8) V.A.M.S. 1959, provides as follows:

"(8) For each driveaway license there shall be paid an annual license fee of thirty-five dollars for one set of plates or such insignia as the director may issue which shall be attached to the motor vehicle as prescribed in this chapter. For single trips the fee shall be three dollars and descriptive insignia shall be prepared and issued at the discretion of the director who shall also prescribe the type of equipment used to attach such vehicles in combinations." (Underscoring added)

It is our opinion that a "driveaway operation" applies only when the motor vehicle is self-propelled under its own power and to other vehicles being towed. It does not apply when the vehicle is being used to haul a cargo. It is not intended as a "haulaway" operation.

Honorable Robert L. Hyder

Section 301.010(1), V.A.M.S. 1959, defines a "commercial motor vehicle" as a motor vehicle designed or regularly used for carrying freight and merchandise or for more than eight passengers.

It is our opinion that a vehicle or combination of vehicles carrying or transporting other motor vehicles, comes under the "commercial motor vehicle classification" and does not come under the "driveaway" provision of the statutes.

Another question submitted is whether or not in the designation of certain highways by the State Highway Commission under Paragraph 6 (supra) the Commission has the authority to limit the type of vehicle that is to use such designated highways.


We believe the authority of the State Highway Commission under this statutory provision, Section 304.170 RS Cumulative Supplement 1965, is limited to designating highways that vehicles may use which have an overall length not to exceed sixty-five feet. We do not believe it authorizes the Commission to designate the type of vehicle that may be used on such highways so long as the vehicles comply with the other statutory provision governing the weight, height, and width of such vehicles.

#### CONCLUSION

1. Freight transport motor vehicles are limited by Section 304.170 RS Cumulative Supplement 1965 to the lengths herein explained.
2. The combination of vehicles referred to in Figure 6 is not a "driveaway operation".
3. The authority of the Highway Commission under Section 304.170 RS Cumulative Supplement 1965, is limited to designating highways on which vehicles not to exceed sixty-five feet may operate.

The foregoing opinion which I hereby approve was prepared by my Assistant, J. Gordon Siddens.

Yours very truly,

  
NORMAN H. ANDERSON  
Attorney General

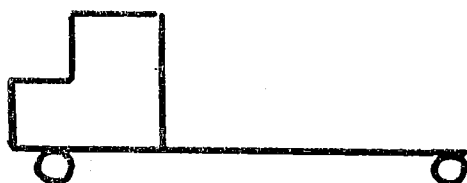


FIGURE NO. 1: TRUCK



FIGURE NO. 2: TRACTOR



FIGURE NO. 3: TRACTOR — SEMI-TRAILER

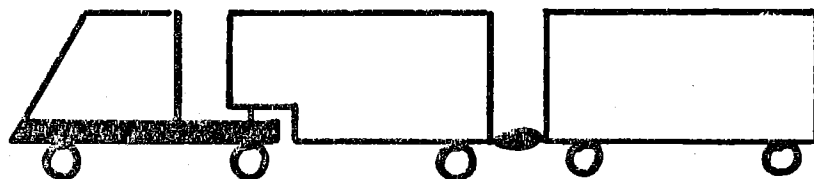


FIGURE NO. 4: TRACTOR — SEMI-TRAILER — TRAILER

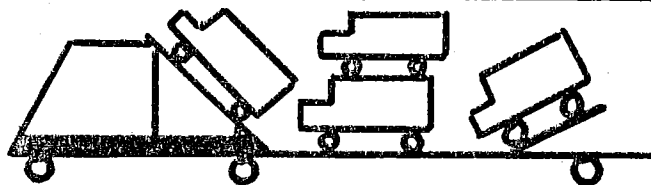


FIGURE NO. 5: TRACTOR AND SEMI-TRAILER  
FOR TRANSPORTING MOTOR VEHICLES

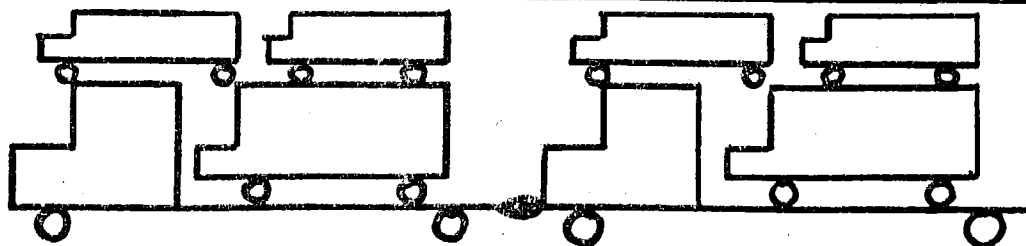


FIGURE NO. 6: 2 TRUCKS  
FOR TRANSPORTING MOTOR VEHICLES

CRIMINAL COSTS:  
MILEAGE:  
SHERIFF:  
COUNTIES:  
EXTRADITION:

Sheriff's mileage incurred in returning an escaped felon from without the state is not taxable as criminal costs to be paid by the state.

Opinion No. 412 (1965)  
53 (1966)

Answered by Letter  
(Peterson)

April 20, 1966

Honorable Roderick R. Ashby  
Prosecuting Attorney  
Mississippi County  
Charleston, Missouri



Dear Mr. Ashby:

Recently you requested an opinion by letter, in which you stated:

"I respectfully request your opinion on the following proposition: 'Is the State liable for the costs of the sheriff in apprehending a criminal defendant charged with breaking jail while under conviction of a felony, Section 557.380, R.S. Mo. 1959'."

Subsequently, several discussions by telephone revealed the following facts; the subject felon was under conviction for arson, sentenced to the penitentiary and escaped the night before he was to be delivered to the prison authorities. Sometime after the escape, the subject felon was recaptured in Wisconsin, whereupon he refused to waive extradition. Extradition was applied for, however, the prisoner changed his mind and waived extradition. The sheriff of Mississippi County, Missouri, proceeded to Madison, Wisconsin, took the prisoner into custody, and returned him to Mississippi County where he stood trial for jail breaking. The prisoner was convicted and sentenced. Subject defendant was certified to be indigent in the breaking jail proceeding.

We enclose herewith a copy of Attorney General's Opinion to Herbert S. Brown dated February 11, 1947, and a copy of Attorney General's Opinion to Hugh M. Atwell dated February 16, 1948, which we believe answers your question.



Honorable Roderick R. Ashby

We have reexamined the cases, and the statutes, including Sections 57.290, 57.300 and 57.430, as well as Chapter 548, RSMo 1959, and we are unable to find any reason to change the former opinions. We find no statute which authorizes the sheriff to be paid a mileage fee for the trip to Wisconsin under the facts nor any authority for the State to pay the same as costs.

Very truly yours,

NORMAN H. ANDERSON  
Attorney General

WAP/jlf

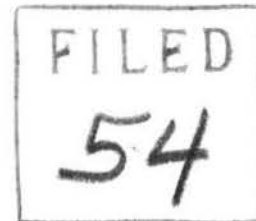
Enc.--2--Op., Herbert S. Brown, 2/11/47  
Op., Hugh M. Atwell, 2/16/48

SCHOOLS: When vacancy exists, which will not be  
ATTENDANCE OFFICER: filled in office of county superintendent  
SUPERINTENDENT OF of schools of third class county, County  
PUBLIC WELFARE: Court of such county may, in its discretion,  
THIRD CLASS COUNTIES: by following procedure of Section 205.850  
RSMo 1959, appoint a county superintendent  
of public welfare, who shall assume all  
powers and duties of school attendance of-  
ficer of said county.

Opinion No. 54 (1966)  
Opinion No. 413 (1965)

April 27, 1966

Honorable Charles A. Weber  
Prosecuting Attorney  
Ste. Genevieve County  
Ste. Genevieve, Missouri  
63670



Dear Mr. Weber:

This office is in receipt of your request for an opinion,  
reading in part as follows:

"Section 164.040 RSMo 1959, provides that  
the County Superintendent of Schools shall  
act as School Attendance Office for the  
County. Our Superintendent of Schools re-  
tired in July of 1965, and the office will  
not be filled.

"Section 205.850 RS Mo 1959 provides for the  
appointment by the County Court in Class 3  
and 4 counties of a Superintendent of Public  
Welfare who shall have the powers and duties  
of the Attendance Officer in the County.

"I would like to know if this is the proce-  
dure (205.850) which must be followed when  
the County Superintendent's Office is vacated."

Honorable Charles A. Weber

Section 164.040 RSMo 1959, was repealed in 1963, and what is now Section 167.071 RSMo Supp. 1965, was enacted in lieu of the former section. The latter section provides the county superintendent of schools in each county is the school attendance officer for the county except in school districts with six or more directors, the school board may appoint and remove at pleasure, one or more school attendance officers. If the board fails to appoint an attendance officer, the county superintendent shall act in the district.

You have failed to state whether or not any of the six-director school districts of your county have appointed attendance officers in their districts. Because of the vacancy in the office of County Superintendent of Schools, there is no school attendance officer for the entire County of Ste. Genevieve. This gives rise to the present inquiry as to whether the procedure set out in Section 205.850 RSMo 1959, must be followed when the County Superintendent's office is vacant, in the appointment of one to serve as county attendance officer.

Section 205.850 RSMo 1959, reads in part as follows:

"The county court in counties of the third and fourth classes may in its discretion, with an order of the juvenile court showing approval, appoint a county superintendent of public welfare, and such assistants as it may deem necessary. Whenever the county court of any county has appointed a superintendent of public welfare such officer shall assume all the powers and duties now conferred by law upon \* \* \* the attendance officer in any incorporated town or village having a population of more than one thousand inhabitants, and no other or different \* \* \* attendance officer or officers shall be appointed \* \* \* by the county superintendent of public schools, or by the school board or any incorporated city, town, or village school district or consolidated school district."

Honorable Charles A. Weber

From the language used in Section 205.850, supra, obviously it was not the intent and purpose of the lawmakers to enact a statute imposing a mandatory duty upon the county court of every third and fourth class county not having a county superintendent of public welfare, to appoint such officer, regardless of the need of the county for one, as well as the available county funds with which to pay the salary of such officer. If it had been the legislative intent to impose such a mandatory duty upon the county courts, then surely said section would have provided what the consequences would be, if a county court failed to make the appointment. We also find no express provisions from which it must necessarily be implied this was the intent of the legislature. We do find in said section evidence of a legislative intent to the contrary, in the specific provision, "The County Court in counties of the third and fourth classes may in its discretion \* \* \* appoint a county superintendent of public welfare and such assistants as it may deem necessary," which clearly indicates the matter of making such appointments has been left to the sound discretion of the county courts. Consequently, the county court must, in each instance decide whether it will or will not make the appointment, and the section is directory and not mandatory in nature.

In the event the county court of the third class county of Ste. Genevieve desires a superintendent of public welfare for the county, the Court must follow the procedure provided by Section 205.850, in making such appointment.

If the Court does make the appointment, then as soon as same becomes effective, in addition to other duties, the appointee shall immediately assume all the powers and duties of attendance officer of the county, as well as all the powers and duties of attendance officer in any incorporated town or village having a population of more than one thousand inhabitants. As long as such appointment of county superintendent of public welfare remains in effect, no attendance officer shall be appointed by the county superintendent of public schools of any incorporated city, town, village or consolidated school district of the county.

#### CONCLUSION

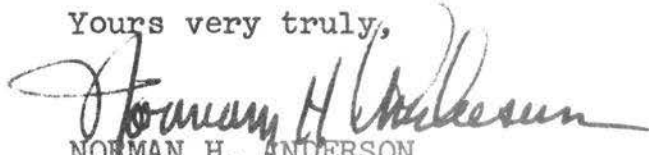
Therefore, it is the opinion of this office that when a vacancy exists in the office of superintendent of schools of a third class county, the county court of such county, may in

Honorable Charles A. Weber

its discretion, by following the procedure provided by Section 205.850 RSMo 1959, appoint a county superintendent of public welfare, who shall assume all the powers and duties of school attendance officer of said county.

The foregoing opinion which I hereby approve was prepared by my Assistant, Paul N. Chitwood.

Yours very truly,



NORMAN H. ANDERSON  
Attorney General

CRIMINAL COSTS: A mental examination granted a defendant under  
INSANE PERSONS: the provisions of Section 552.030, RSMo. Supp.  
CRIMINAL INSANE: 1965, by a physician of his own choosing and  
MENTAL ILLNESS: subsequent to the examination of the physician  
appointed by the court, is an examination in-  
curred on behalf of the defendant and neither  
such examination nor subsequent testimony in  
the case may be taxed as costs against the State.

OPINION NO. 56 (1966)  
Opinion No. 417 (1965)

January 27, 1966

Honorable Claude E. Curtis  
Circuit Judge, 19th Judicial District  
Lebanon, Missouri



Dear Judge Curtis:

This is in response to your opinion request relative to the taxation of costs of psychiatric examination and testimony under the provisions of Section 552.080, RSMo. Supp. 1965, and the psychiatric evaluation provisions of Section 552.030, RSMo. Supp. 1965, for determination of the question of whether the accused suffered a mental disease or defect excluding criminal responsibility. More specifically, you inquire whether the fee for the examination and testimony of a physician of an indigent defendant's own choosing, may, after conviction in a capital case, be taxed against the State although there has already been a previous examination of the same defendant to determine the same issue by examining doctors, appointed by the court, who found that said defendant was not suffering from any disease or defect as defined in Section 552.010, RSMo. Supp. 1965.

You note in your letter the provisions of Section 550.020, RSMo., which requires the State to pay certain costs if the defendant shall be unable to pay them, except costs incurred on behalf of defendant. This Section states as follows:

"1. In all capital cases in which the defendant shall be convicted, and in all cases in which the defendant shall be sentenced to imprisonment in the penitentiary, and in cases where such person is convicted of an offense punishable solely by imprisonment in the penitentiary and is sentenced to imprisonment in the county jail, workhouse or reform



Honorable Claude E. Curtis, Judge

school because such person is under the age of eighteen years, the state shall pay the costs, if the defendant shall be unable to pay them, except costs incurred on behalf of defendant."

The provisions contained within Chapter 552, relative to examination by physicians, are unique in that they were not contained in the repealed legislation regarding criminal proceedings involving the insane. The analysis of the intent of the legislature appears to be adequately reflected by the article entitled "A Consensus" printed in the December 1963, issue of the Missouri Bar Journal at page 666, and purporting to be a consensus of opinion of some members of the Missouri Division of Mental Diseases and State hospital staff psychiatrists in Missouri. The article states:

"The really tremendous advance is that we have abandoned the adversary system in the presentation of psychiatric testimony, placed the witness in a position of neutrality, have removed any semblance of partisan profit motive for the expert, and in fact have allowed him in his own words, thoughtfully and deliberately to set down without hampering or heckling objection, his best and fullest report to the court regarding the truth of the matter of psychiatric concern. All this, without depriving either side of the necessary right of cross-examination, if thought necessary or desirable."

Even though this language is couched in laymen's terms and might be subject to some practical qualification, nevertheless it appears that the point is well taken that the Act contemplates a complete and impartial examination.

Section 552.030, states in part as follows:

"4. Whenever the defendant has pleaded mental disease or defect excluding responsibility or has given the written notice provided in subsection 2, and such defense has not been accepted as therein provided, the court shall, after notice and upon motion of either the state or the defendant, appoint one or more physicians to examine and report upon the mental condition

Honorable Claude E. Curtis, Judge

of the defendant. No physician shall be appointed unless he has consented to act. Examinations ordered hereunder shall be made at such time and place and under such conditions, including confinement to a hospital or other suitable facility and the interview of witnesses or other physicians, as the court deems proper. Copies of the reports of the examinations made by the physician or physicians appointed by the court shall be delivered to both the state and the defendant. Within five days after receiving a copy of such report, both the accused and the state shall, upon written request, be entitled to an order granting them an examination of the accused by a physician of their own choosing. If such examination is requested, a report of the examination made by the examining physician shall be furnished to the court and to the opposing party. \* \* \*

We note that when the defendant relies upon the defense of mental disease or defect excluding responsibility, the court shall, after notice and upon motion of either the State or the defendant, appoint one or more physicians to examine and report upon the mental condition of the defendant. We do not interpret this language to indicate that the appointment of such a physician would be of an adversary nature or comparable to the position of an expert witness normally called upon to testify on behalf of either party to the case. Although the motion may be made by either the State or the defendant it appears that the appointment of the physician is within the control of the court as well as the time, the place and other conditions, including confinement, as the court deems proper. We therefore do not think that the appointment made pursuant to this provision is made either on behalf of the State or of the defendant and if made on the motion of the defendant is not such as to fall within the category of costs incurred on his behalf. To interpret this provision otherwise or as in conflict with Section 550.020 would create an inequity in the administration of justice in that the possibility would arise whereby an indigent defendant may not have the examination facilities available to him inasmuch as no physician shall be appointed unless he consents to act. This result would frustrate the purpose of the legislation and the intent of the legislature.

Honorable Claude E. Curtis, Judge

On the other hand, the question you raise specifically concerns whether the court may tax as costs against the State the examination made by a physician of the defendant's choice after an examination by a physician appointed by the court.

Section 552.030 provides that the accused will be entitled to an order granting him an examination by a physician of his own choice within five days after receipt of the copy of the report by the court-appointed physician.

In this instance it is presumed that the initial examination, whether made by the court on the motion of the accused or the State, was sufficiently clear and complete to provide the court and the jury with substantial evidence of the mental condition of the accused. There is no doubt that the court could order further examinations if it was felt to be necessary to clarify or elaborate or make material psychiatric findings not initially determined. The order granting the defendant an examination by a physician of his own choosing after the filing of the report of the initial examination is an order made on his behalf. Therefore, the costs of examination and testimony so incurred are within the prohibition of Section 550.020 and cannot be taxed against the State.

#### CONCLUSION

It is therefore the opinion of this office that a mental examination granted a defendant under the provisions of Section 552.030, RSMo. Supp. 1965, by a physician of his own choosing and subsequent to the examination of the physician appointed by the court, is an examination incurred on behalf of the defendant and neither such examination nor subsequent testimony in the case may be taxed as costs against the State.

The foregoing opinion which I hereby approve, was prepared by my assistant, John C. Klaffenbach.

Yours very truly,

  
NORMAN L. ANDERSON  
Attorney General

STATE REPRESENTATIVE: A state representative may serve as real  
REAL PROPERTY APPRAISER: property appraiser for the Probate Court  
PROBATE COURT: in Jackson County, without violating any  
state statute or Article III, Section 12  
of the Missouri Constitution.

January 19, 1966



OPINION NO. 57 (1966)  
OPINION NO. 420 (1965)

Honorable Kenneth L. Growney  
Representative 6th District  
Missouri House of Representatives  
3707 Madison  
Kansas City, Missouri

Dear Representative Growney:

This is in response to your request for an opinion of this office which asks whether a member of the General Assembly may serve in the capacity of a real property appraiser for the probate court in Jackson County, without violating any state statute or constitutional provision?

I direct your attention to the Missouri Constitution, Article III, Section 12, which states in part:

" . . . When any senator or representative accepts any office or employment under the United States, this state or any municipality thereof, his office shall thereby be vacated and he shall thereafter perform no duty and receive no salary as senator or representative . . . "

The term "office" or "employment" as used in this section is an office or employment by the United States, this state, or any municipality thereof. This implies that an office or employment not within these areas is not prohibited.

Honorable Kenneth L. Growney

Sections 145.150 to 145.190 RSMo 1959, deal with the duties of the appraiser. Section 145.150, subsection 3, states in part:

"If it appears that the estate may be subject to such tax, the court shall set a day for the hearing and determining the amount of the tax . . . or the court, before determining such matters, may of its own motion, or on the application of any interested person, . . . appoint some qualified tax paying citizen of the county, . . . as appraiser to appraise and fix the clear market value of any property, estate or interest therein, or income therefrom which is subject to the payment of a tax under this chapter."

Subsection 4 states:

"Every such appraiser shall make and subscribe, and file with the court appointing him, an oath that he will faithfully and impartially discharge his duties as appraiser and that he will appraise all the property, estate, interest therein, or income therefrom involved in the proceeding in which he is appointed at its clear market value and shall forthwith fix a time and place for hearing the evidence and shall file notice thereof with the court appointing him not less than ten days prior to the date fixed and shall also give notice by mail to all interested persons whose address he may have, always including the director of revenue and the prosecuting attorney of the county."

Section 145.160 states:

"The appraiser shall appraise all property, estate, assets, interest or income at its clear market value and he is hereby authorized to issue subpoenas and compel the attendance before him of witnesses and the production of books, records, documents, papers, and all other material evidence, to administer oaths and to take the testimony of all witnesses under oath."

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"He shall make report of his appraisement to the court in writing and shall return the testimony of the witnesses and all other evidence and such other facts in relation thereto as the court may by its order require, and such report shall be made within twenty days after the appointment of such appraiser, unless the court, for good and sufficient cause, by order gives such appraiser further time in which to report; provided, when the estate consists of personal property only, the prosecuting attorney may, with the consent of the director of revenue agree with the parties liable to pay any tax upon the amount of the same, and the court, if it approves such agreement, shall enter judgment accordingly and no appraiser shall be appointed."

Section 145.170 allows for exceptions to appraiser's report and appeal from such report.

Section 145.180 deals with the appraiser's duty to file a report with the court.

Section 145.190 states:

"The appraiser shall be entitled to a reasonable fee for the time he is engaged in hearing the evidence, viewing the property, and preparing and filing his reports, and the actual and necessary expenses incurred by him in the performance of his duties, which together with all witness fees and other costs shall be taxed against and paid by the administrator, executor, or trustee as other costs of the estate, and if no administration is pending, then by the persons liable for the tax, but before the appraiser shall be entitled to his fee or expenses he shall file with the court appointing him a sworn statement of the same and the court shall allow him a reasonable fee and expenses actually and necessarily paid by him in the performance of his duty as such appraiser."



Honorable Kenneth L. Growney

"And such appraiser who shall take, directly or indirectly, any fee or reward other than such as may be allowed him by law from any executor, administrator, trustee, legatee, next of kin, or heir of any decedent or from any other person liable to pay said tax or any portion thereof, shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not less than five hundred dollars, or be imprisoned in the county jail six months, or both."

In State vs. Truman, 333 Mo. 1018, 64 S.W. 2d 105, 106, the Court said:

"Numerous criteria, such as (1) the giving of a bond for faithful performance of the service required, (2) definite duties imposed by law involving the exercise of some portion of the sovereign power, (3) continuing and permanent nature of the duties enjoined, and (4) right of successor to the powers, duties, and emoluments, have been resorted to in determining whether a person is an officer, although no single one is in every case conclusive, 46 C.J. 928, §19, n. 1; 53 A.L.R. p.595. It is the duty of his office and the nature of the duty that makes one an officer and not the extent of the authority (Mechem on Public Officers, p.7, §9; Throop on Public Officers, pp.2,3 §2), although designation by law has some significance. 46 C.J. p.931 §24; State ex rel. v. Gray, 91 Mo.App. 438, 445; State ex rel. Cannon v. May, 106 Mo. 488, 505, 17 S.W. 660; State ex rel. v. Shannon, 133 Mo. 139, 164, 33 S.W. 1137; Gracey v. St. Louis, 213 Mo. 384, 393, 394, 111 S.W. 1159.

"In Mechem on Public Officers, pp. 1 and 2, §1, it is said: 'A public office is the right, authority and duty, created and conferred by law, by which for a given period, either fixed by law or enduring at the pleasure of the creating power, an individual is invested

Honorable Kenneth L. Growney

with some portion of the sovereign functions of the government, to be exercised by him for the benefit of the public. The individual so invested is a public officer . ' . . ."

An examination of this criteria in conjunction with the Sections pertaining to the appraiser's duties reveals:

(1) That the appraiser is not required to give bond for the faithful performance of his duties.

(2) The exercise of the power delegated to the appraiser to wit: to issue subpoenas, to administer oaths, and to take testimony of witnesses, are not the exercise of sovereign powers for public benefit as pointed out by dicta in *Mulnix vs. Elliott*, 62 Col. 46, 156 P. 216, 217, which states that the exercise of the authority to issue subpoenas, administer oaths, and take testimony, are not necessarily an exercise of sovereign functions for the public benefit so as to require classifying a person exercising such authority as a public officer.

(3) The duties of the appraiser are not continuing and permanent. The court, in *Fairbanks v. Mann*, 19 R.I. 499, 34 A. 1112, 1113, states:

" . . . An appraiser is not an officer of the probate court. He is simply a person appointed by that court to appraise the goods and chattels, rights and credits of the deceased . . . and to make return thereof under oath to said court . . . This being done, he has discharged his trust, and his duties are at an end."

It should be mentioned at this time that the statutes dealing with the appraiser's duties do not refer to him as a public officer or employee.

6 C.J.S. Appraisers, p.92, states:

"A person appointed by competent authority to ascertain and to state the true value of property submitted to his inspection, and who is usually sworn to perform such duty. The term imports disinterestedness, and, in particular connections, implies appointment by, but not as an officer of, the court, the term having

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been construed not as an official or technical appellation, but rather as descriptive of the duties which he has been commissioned to perform . . ."

As indicated above, the appraiser is not an officer of the state, but Article III, Section 12, supra, also mentions employment by the state or municipality thereof as being prohibited.

The Court, in Rider vs. Julian, 365 Mo. 313, 282 S.W. 2d 484, states at p.493:

"None of the . . . employees were paid by the state. This is a strong factor indicating that they were not state employees . . . In 81 C.J.S. States, §53, p.973, with reference to state employees, it is stated: 'payment of particular persons by the state is a very strong circumstance showing that they are state employees, and it has been held that one becomes a civil servant or employee only when he furnishes his services or labor for compensation directly paid to him by the state . . .' "

Section 145.160, supra, specifically provides payment by the estate or persons liable for the tax.

In Parker vs. Riley, 18 Cal. 2d 83, 113 P. 2d 873, the court, interpreting a similar constitutional provision as Article III, Section 12, supra, states:

"The . . . provision has been said . . . to have been designated to prevent the acquiring by members of the legislature of positions on the state pay roll which might prevent their maintaining a desirable independence of mind . . ."

As there are no other statutory or common law prohibitions against a representative holding a position as appraiser, it is the opinion of this office that a representative will not violate Article III, Section 12, of the Missouri Constitution by accepting appointment as appraiser of the probate court of Jackson County, because his duties and functions are not such as would justify his being called an officer or employee of the state or municipality thereof.

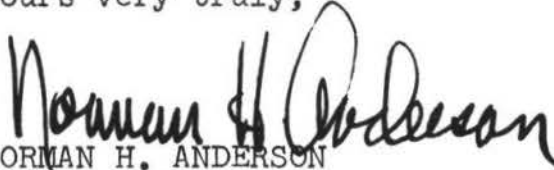
Honorable Kenneth L. Growney

CONCLUSION

It is the opinion of this office that a state representative may serve as real property appraiser for the probate court of Jackson County, without violating any state statute or Article III, Section 12, of the Missouri Constitution.

The foregoing opinion which I hereby approve was prepared by my assistant, Gerald L. Birnbaum.

Yours very truly,

  
NORMAN H. ANDERSON  
Attorney General

STEALING: Lessee of personal property is guilty of  
LARCENY: stealing personal property where, with the  
EMBEZZLEMENT: required specific intent, he fails to return  
LEASED PROPERTY: the property at the time and place required  
PERSONAL PROPERTY: by the lease.  
CRIMINAL LAW:

February 25, 1966

OPINION NO. 61 (1966)  
OPINION NO. 426 (1965)

Honorable Kenneth J. Rothman  
State Representative  
St. Louis County, 8th District  
6815 Plymouth Avenue  
University City 30, Missouri



Dear Representative Rothman:

This opinion is in answer to your inquiry about Section 560.156 (2) RSMo 1959, asking whether such section makes the action of an individual who has leased personal property; and thereafter, fails to return it at the time required in the contract, guilty of stealing contrary to Section 560.156, RSMo 1959.

Section 560.156, 1-(2) RSMo 1959, reads as follows:

"1. As used in sections 560.156 and 560.161, the following words shall mean:

\* \* \* \* \*

"(2) 'Steal', to appropriate by exercising dominion over property in a manner inconsistent with the rights of the owner, either by taking, obtaining, using, transferring, concealing or retaining possession of his property."

Under the facts stated, the offense was known in earlier Missouri criminal law as embezzlement. State v. Roussin 189 S.W. 2d 983, 984-985; State v. Russell 265 S.W. 2d 379, 380.

In 1955, the offenses of larceny, obtaining property by false pretenses, and embezzlement were merged. The Missouri Supreme Court in State v. Zammar, 305 S.W. 2d 441, 443, has

this to say:

"\* \* \* In 1955 the Legislature, by Senate Bill 27, repealed 59 separate sections of the statutes relating to offenses against property, and enacted in lieu thereof five new sections (now known as § 560.156 and § 560.161) relating to the same subject, and thereby consolidated, combined or merged larceny, embezzlement, obtaining money or property by false pretenses and other kindred offenses into one crime, denominated 'stealing'. Paragraphs (1) and (2) of subsection 1 of § 560.156 define the words 'property' and 'steal', as used in the act, as follows:

"(1) 'Property', everything of value whether real or personal, tangible or intangible, in possession or in action, and shall include but not be limited to the evidence of a debt actually executed but not delivered or issued as a valid instrument and all things defined as property in sections 556.070, 556.080 and 556.090, RSMo 1949:

"(2) 'Steal', to appropriate by exercising dominion over property in a manner inconsistent with the rights of the owner, either by taking, obtaining, using, transferring, concealing or retaining possession of his property.\* \* \*"

\* \* \* \* \*

"With reference to the purpose of the new Florida statute, the Supreme Court of that state approved the following view of the trial judge in the case of Thomason v. American Fire & Casualty Company, 5 Fla. Supp. 129, which we find apposite to our own similar statute: 'The real purpose of the statute was to eliminate technical distinctions between the offenses of larceny, embezzlement and obtaining money under false pretenses. Prior to the enactment thereof in 1951 it was not uncommon for a criminal prosecution to become confused and sometimes result in a miscarriage of justice because of the fine line of demarcation between these offenses as they had previously been defined



Representative Rothman

by the legislature and the courts. The history of the times and of the particular legislation involved clearly indicates that the intent of the legislature was to eliminate this confusion and to simplify prosecutions involving the wrongful and criminal acquisition by one person of the property of another.' Anglin v. Mayo, Fla., 88 So. 2d 918, 922. See, also, State v. Pete, 206 La. 1078, 20 So. 2d 368, 372."

See also State v. Gale, 322 S.W. 2d 852.

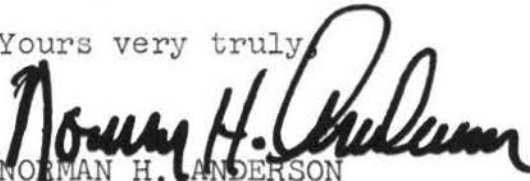
We conclude there is an offense which is proscribed by Section 560.156, RSMo 1959, and is called "stealing". It includes a person who leases or rents property but fails to return the property intending to "appropriate by exercising dominion over the property in a manner inconsistent with the rights of the owner." Proof of anything less than this would not constitute an offense under this statute. The underscored portion must also be established. Thus mere failure to return the property without this intent would not constitute an offense under the statute.

#### CONCLUSION

It is the opinion of this office that the offense of stealing under Section 560.156, RSMo 1959, is committed where a lessee of personal property, entertaining a specific intent to appropriate by exercising dominion over the property in a manner inconsistent with the rights of the owner, fails to return the personal property at the time and place required by the lease.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Richard C. Ashby.

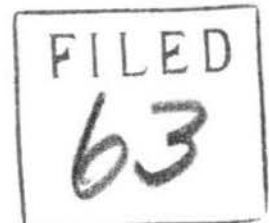
Yours very truly,

  
NORMAN H. ANDERSON  
Attorney General

PRISONERS: A person erroneously convicted does not have  
CONSTITUTIONAL LAW: a "legal claim" against the state and the  
LEGISLATURE: legislature may not make a grant for his relief  
CLAIMS: under our present Constitution. An amendment  
to the Constitution would be necessary to  
authorize passage of enabling laws to accomplish this.

August 26, 1966

OPINION NO. 429 (1965)  
OPINION NO. 63 (1966)



Honorable Alfred A. Speer  
Representative of 12th District, St. Louis County  
Missouri House of Representatives  
7751 Carondelet Avenue  
Suite 406  
Clayton, Missouri

Dear Representative Speer:

This opinion is in response to your inquiry whether the legislature has authority to appropriate money for the relief of individuals wrongfully convicted and imprisoned. If there is no authority for such action, would a statutory or constitutional change be necessary to provide such authority?

It is assumed for the purposes of this opinion that the accused (subject of claim herein) was properly charged before a court having jurisdiction of the person and offense; that he was afforded due process; and based upon competent evidence, duly convicted and sentenced under the statutes.

Article III, Section 38(a), Missouri Constitution, 1945, provides, in pertinent parts, that:

"The general assembly shall have no power to grant public money or property \* \* \* to any private person \* \* \*."

The term "grant" as used in Section 38(a) of Article III, is a word of special meaning (as used here) and needs to be

Honorable Alfred A. Speer

defined. The Missouri Supreme Court in *State ex rel. v. Howard*, 208 S.W.2d 247, 1.c. 250, had this to say:

"\* \* \* This prohibition does not apply (speaking of Section 38(a)) to the appropriation to relator because it was in payment of a valid public obligation and was not a grant or gift of public money\* \* \*."  
(Insert ours)

We believe the words "grant" and "gift" can be equated and that the term imports an act granting money to a private person without a valuable consideration.

On the basis of the assumed factual posture of this case, the next consideration for resolution is whether a valid claim exists. In 81 C.J.S. "States" Section 194 at p. 1260, we find the following definition of a "legal claim" to be:

"A claim against the state is a demand by some one other than the state against it for money or property; but when the claim originates with the state, or in its behalf, and contemporaneously with its origin, and means and manner of payment are provided, as in the case of a bond, it does not then constitute a claim proper against the state, but a liquidated and legalized demand against the treasury. A 'legal claim' against the state is one recognized or authorized by the law of the state, or which might be enforced at law if the state were a private corporation. Within the meaning of statutory or constitutional provisions relating to their presentation and allowance, the term 'claims against the state' refers to a legal claim, a claim as of right, and generally it is further limited to claims arising out of contract, where the relationship of debtor and creditor exists.

\* \* \* \*

"The term has been held not to include a claim for damages from negligent acts of the state's employees, a gratuity to recompense a citizen for false imprisonment for a crime, \* \* \*"

The Supreme Court of the State of Montana gave a very clear

Honorable Alfred A. Speer

definition of what constitutes a "legal claim" against a State in the case of *Mills vs. Stewart*, 247 Pac. 332. That Court, 1.c. 335, defined the phrase "legal claim" as follows:

"\* \* \* If the term 'legal claim' as applied to a state has any meaning, it must refer to a claim which is recognized or authorized by the law of the state, or one which might be enforced in an action at law if the state were a private corporation, \* \* \*"

See also *Allen v. Board of Auditors* (Mich. -1899) 81 N.W. 113 1.c. 114.

This constitutional provision (*supra*) directly prohibits the "grant" of public monies to a private person. Regardless of how meritoriously on a moral basis the claim may be, this section acts as a direct prohibition to any action by the legislature falling within the ambit of the above quoted section. We conclude therefore that if the claim of this individual is without a legal basis which would be enforceable in an action at law against a private person, any "grant" by the legislature would be prohibited under Article III, Section 38(a), Missouri Constitution of 1945.

If an action at law by claimant exists at all, it would sound in tort for false imprisonment. The elements of that action are:

- (1) The detention of the person
- (2) The unlawfulness of such detention

See *Gerald v. Caterers, Inc.*, 382 S.W.2d 740; *Engelbrecht v. Roworth*, 157 S.W.2d 242.

It is to the last element of false imprisonment that is lacking under the factual situation involved here since the person convicted in the instant case was admittedly duly convicted albeit erroneously. We conclude, therefore, that the claimant does not have a "legal claim" but at the most, could be said to have only a claim arising out of a moral obligation. Thus, even if the legislature should enact legislation waiving the doctrine of sovereign immunity, no action would lie.

The claim herein falls within a category having its genesis as a moral obligation and as such, constitutes no more than a moral

Honorable Alfred A. Speer

consideration for a legislative grant. This factor, in view of our previous discussion of Article III, Section 38(a) of the Missouri Constitution, 1945, would deny granting relief by the legislature. We are aware other states may follow a different rule (see 172 A.L.R. 1407). However, we believe the Missouri rule to be different in that a moral wrong is not a valuable consideration and will not sustain a legal action (Heckmann v. Van Graafeiland, 291 S.W. 190, 192).

We conclude therefore that the erroneous conviction and sentence does not afford a valid basis for an action at law or a legislative appropriation granting relief to this claimant.

There remains the question whether a constitutional amendment would be necessary to grant authority to the legislature before relief could be granted to claimant. Exceptions have been previously written into the Constitution of Missouri in Section 38(a), Article III, as for example, in cases allowing enabling legislation to be enacted on old age assistance, aid to dependent children, etc. Thus, by inserting an appropriate clause in Section 38(a), authority to pass enabling legislation by the legislature to recompense persons wrongfully convicted could be provided for. However, and absent such authority, there exists presently no legal way either by legal action or as a direct legislative grant to compensate a person erroneously convicted under the facts upon which this opinion is predicated. We conclude, therefore, the only way to afford a remedy to a person erroneously convicted would be to have a constitutional amendment as suggested above, and thereafter, for the legislature to enact appropriate enabling legislation.

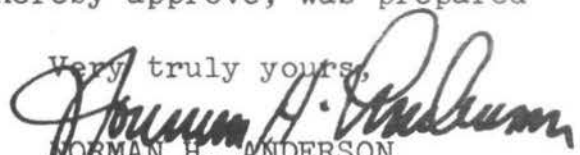
#### CONCLUSION

It is our opinion that:

1. The legislature is prohibited by Section 38(a), Article III, of the Missouri Constitution, 1945, from granting direct relief to any person erroneously convicted.
2. A constitutional amendment granting power to the legislature to pass enabling laws authorizing a procedure and payment of monies to a person erroneously convicted would be necessary.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Richard C. Ashby.

Very truly yours,

  
NORMAN H. ANDERSON  
Attorney General

INSURANCE: Under 375.180 the tax on net premiums is imposed upon  
TAXES: the agent and may be recovered through the premium  
STATE: charged from the state as purchaser of insurance.  
Under 375.190 the tax on net premiums is imposed upon  
the purchaser and may not be recovered from the state  
as purchaser of insurance.

OPINION NO. 64 (1966)  
430 (1965)

December 9, 1966

Honorable Robert D. Scharz  
Superintendent of Insurance Division  
State of Missouri  
Jefferson City, Missouri



Dear Mr. Scharz:

Reference is made to your request for an official opinion from this office in regard to three questions concerning the opinion of this office rendered to C. R. Hardy on February 16, 1956. The prior opinion concluded that the state is not liable for a tax of 5 per cent levied on premiums for policies insuring property at the Missouri State Penitentiary, said policies having been issued by an insurance company not admitted to do business in this state. A consideration of the questions raised by you has caused this office to re-examine the conclusions of the prior opinion.

Section 375.010, RSMo, (all statutory references herein are to the Missouri Revised Statutes as amended) requires all insurance companies to procure a certificate of authority from the Superintendent of Insurance before transacting any insurance business in this state. However, insurance may be placed in companies not authorized to do business in this state pursuant to Section 375.170. The relevant provisions of Section 375.170 are as follows:

"The superintendent of insurance may issue to an agent who is regularly commissioned to represent one or more insurance companies authorized to do business in this state a certificate of authority to place lines of insurance in companies not admitted to do business in this state \* \* \* ."

The following provisions of Section 375.180 are applicable to the insurance placed by an agent pursuant to a certificate of authority granted under Section 375.170.



Honorable Robert D. Scharz

"Every agent so licensed shall report \* \* \* to the superintendent of insurance \* \* \* the amount of net premiums received by him for such insurance placed in companies not admitted to do business in this state and shall pay a tax of five per cent thereon \* \* \* ."

Thus, a licensed agent may be granted a certificate of authority to place lines of insurance in companies not admitted to do business in this state. The agent must pay a tax of 5 per cent on the net premiums received by him for the insurance business transacted under the certificate of authority. The certificate of authority is issued to a previously licensed agent rather than to the company or to the purchaser of insurance. The statute does not impose the tax upon the company issuing the policy or upon the person buying such policy. The tax is imposed directly upon the licensed agent who collects premiums for insurance placed by him in companies not admitted to do business in this state pursuant to the certificate of authority granted to the agent for this purpose.

The prior opinion of this office concluded that the state is not liable for the tax imposed by Section 375.180. This conclusion appears to have been premised upon the thought that the tax was being imposed upon the purchaser of the policy. This premise was erroneous. As noted above the tax is imposed upon the agent, and the agent can set the purchase price, including taxes, that a purchaser will have to pay for an insurance policy. The taxes are included as part of the total amount of the premium for the policy and the purchaser is not paying the taxes as such. Therefore, if the state is a purchaser of an insurance policy the agent can recover all of his costs through the premium charged including the taxes imposed on the agent pursuant to Section 375.180. See *City of St. Louis v. Smith*, 114 S.W.2d 1017. Pursuant to these views, the prior opinion of this office is withdrawn.

Your questions seeking clarification of the prior opinion refer without comment to Section 375.190 as well as 375.170 and 375.180.

Section 375.190 sets forth provisions for a person to obtain insurance in foreign companies not authorized to do business in this state for himself, a firm of which he is a member or a corporation in which he is interested. The Superintendent of Insurance may grant a license to a person for this purpose upon compliance with the statutory provisions. Such license is issued directly to the insured and the licensee may obtain insurance thereunder without going through a licensed agent. The provisions of Section 375.190 do not license a company or an agent. The purchaser of insurance under this section is liable for a tax of 5 per cent upon the net premiums paid for such insurance.

Honorable Robert D. Scharz

The prior opinion of this office was concerned with the purchase of insurance for the Missouri State Penitentiary pursuant to the provisions of Sections 375.170 and 375.180. Conceivably, the Director of the Department of Corrections could obtain a license from the Superintendent of Insurance pursuant to Section 375.190 authorizing the Department to obtain insurance for the Missouri State Penitentiary from foreign companies not authorized to do business in this state. As noted above a tax of 5 per cent on the net premiums is imposed upon the purchaser of such insurance. In State ex rel. Missouri Portland Cement Co. v. Smith, 338 Mo. 409, 90 S.W.2d 405, the Supreme Court held that the sales tax was not applicable to the purchase of materials by the State Highway Commission. This conclusion of the Court was based upon the principle that excise taxes are not applicable to the state and its subdivisions unless the statute imposing such tax specifically applies the tax to the state and its political subdivisions. Under the principles followed in the cited case, the 5 per cent tax on net premiums imposed on the purchasers of insurance pursuant to the provisions of Section 375.190 is not applicable to the state and its subdivisions.

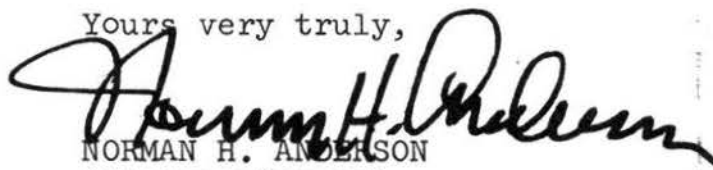
#### CONCLUSIONS

The 5 per cent tax on net premiums for insurance placed in companies not admitted to do business in this state pursuant to Sections 375.170 and 375.180, RSMo, is imposed directly upon the licensed agent who holds a certificate of authority for such purpose. The tax may be included by the agent in the premium charged for such insurance and may be recovered from the State of Missouri and its political subdivisions as purchasers of such insurance.

The 5 per cent tax upon net premiums for insurance obtained from companies not authorized to do business in this state pursuant to Section 375.190, RSMo, is imposed directly upon the purchaser of such insurance, and the State of Missouri and its political subdivisions are not liable for the tax as purchasers of such insurance.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Thomas J. Downey.

Yours very truly,

  
NORMAN H. ANDERSON  
Attorney General

January 18, 1966



Honorable James Millan  
Prosecuting Attorney  
Pike County  
Bowling Green, Missouri

Dear Mr. Millan:

This is in answer to your request for an opinion on whether there is any prohibition against running for prosecuting attorney and also for the board of trustees of the county hospital in the same county.

The law in Missouri is settled that a man, absent statutory or constitutional provisions to the contrary, may hold more than one office providing the offices are compatible. See State, ex rel. Walker v. Bus, 135 Mo. 326. There appears to be no statutory or constitutional provisions against the same person being prosecuting attorney and also trustee of the county hospital. Therefore, the question is whether the offices are incompatible under common law principles.

Enclosed is Attorney General Opinion, dated June 28, 1954, to the Honorable J. Patrick Wheeler, which we still adhere to, holding that the duties of prosecuting attorney and those of trustee of a county health center of the same county are incompatible.

County health centers, including the trustees for such centers are provided for in Chapter 205, RSMo, specifically Sections 205.010 through 205.155. In the same chapter Sections 205.160 through 205.375 provide for county hospitals. The reasoning in the Wheeler opinion applies equally as well to the office of county hospital trustee as to that of county health center trustee. Accordingly it is our opinion that the duties of prosecuting attorney and those of trustee of a county hospital are incompatible and one person may not hold both at the same time.

Very truly yours,

Norman H. Anderson  
Attorney General

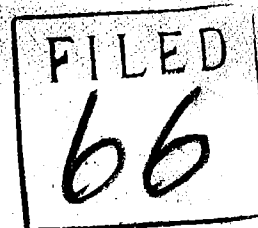
Enclosure: Opinion No. 96, to Wheeler, 6/28/54

TAXATION: County collectors are entitled to charge to  
MERCHANTS TAX: and collect from persons paying merchants and  
MANUFACTURERS TAX: manufacturers taxes that become delinquent  
January 1, 1966, and January 1 each year  
thereafter the two per cent commission allowed  
for the collection of delinquent and back taxes pursuant to Section  
52.290 RSMo, in addition to the interest and penalties provided by  
Senate Bill No. 356, 73rd General Assembly, Section 150.235 RSMo  
Cum. Supp. 1965.

January 12, 1966

OPINION NO. 66 (1966)  
OPINION NO. 434 (1965)

Honorable Haskell Holman  
Auditor of the State of Missouri  
Jefferson City, Missouri



Dear Mr. Holman:

This letter is in response to your request for an opinion of  
this office on the questions you have stated as follows:

"1. Under the provisions of Senate Bill 356  
enacted by the Seventy-Third General Assembly  
shall the Collector of Revenue charge penalty  
on delinquent merchant and manufacturer tax  
collections at the rate of one per cent per  
month for each month of delinquency plus a  
flat ten per cent, or is it to be interpreted  
to be only one per cent per month not to ex-  
ceed, in the aggregate, ten per cent per annum?

"2. Will county collectors be entitled to  
charge to and collect from the parties paying  
merchants and manufacturers taxes that become  
delinquent January 1, 1966 and January 1 each  
year thereafter the two per cent commission  
allowed for the collection of delinquent and  
back taxes as set forth in the provisions of  
Section 52.290 RSMo 1959? If not, what part,  
if any, of the penalties provided in Senate  
Bill 356 will a collector be entitled to re-  
tain as compensation for the collection of  
delinquent merchants and manufacturers taxes?"

We enclose a copy of the opinion of the Attorney General  
No. 371 To Honorable Donald J. Stohr dated November 8, 1965, which

Honorable Haskell Holman

supplies the answer to your first question. The enclosed opinion holds that Senate Bill 356, 73rd General Assembly, Section 153.235 RSMo Supp. 1965, provides for interest on delinquent merchants and manufacturers taxes at the rate of ten per cent per annum (five-sixths of one per cent per month), in addition to a penalty of one per cent per month, which penalty is not to exceed a total of ten per cent for each year the tax is delinquent.

Respecting the second question as to whether County Collectors are entitled to receive the 2% commission for collection of delinquent merchants and manufacturers taxes under Section 52.290 RSMo 1959.

Section 52.290 provides:

"In all counties the collector shall be allowed a commission for the collection of delinquent and back taxes of two per cent on all sums collected to be added to the face of the tax bill and collected from the party paying the tax."

The Supreme Court in *American Airlines, Inc. v. City of St. Louis*, 368 S.W. 2d 161, 168, commented on this statute as follows:

"And all county collectors are allowed a commission for the collection of delinquent and back taxes by Section 52.290, of two per cent on all sums collected, to be added to the tax bill and paid by the party paying the tax."


The Court then ruled that the Collectors' Commissions should be collected in addition to other penalties allowed by law. Since Section 150.235 RSMo Cumulative Supplement 1965 (Senate Bill 356) does not exclude the operation of Section 52.290 we hold that both Sections apply to such delinquent taxes.

#### CONCLUSION

It is the opinion of the Attorney General that county collectors are entitled to charge to and collect from persons paying merchants and manufacturers taxes that become delinquent January 1, 1966, and January 1 each year thereafter the two per cent commission allowed for the collection of delinquent and back taxes pursuant to Section 52.290 RSMo, in addition to the interest and penalties provided by Senate Bill No. 356, 73rd General Assembly, Section 150.235 RSMo Cum. Supp. 1965.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Donald L. Randolph.

Very truly yours,

  
NORMAN H. ANDERSON  
Attorney General



LABOR ORGANIZATION:  
NEGOTIATION:  
PUBLIC BODY:  
POLITICAL SUBDIVISION:  
CITIES:  
SCHOOLS & SCHOOL DISTRICTS:  
COLLECTIVE BARGAINING:  
STATE:  
STATE OFFICERS:  
STATE BOARDS AND COMMISSIONS:

1. A representative of a public body may in its discretion meet with a representative of employees and talk about problems of mutual interest. This does not include the right or power to engage in collective bargaining. 2. If an understanding is reached between representatives of the public body and representatives of the employees the understanding shall be reduced to writing, but does not constitute a contract, and shall be submitted to the public body for appropriate action. 3. Any public body has the right and power to discuss matters of mutual interest with its employees or their representatives.

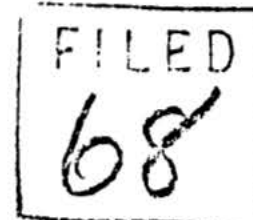
May 6, 1966

OPINION NO. 68 (1966)  
No. 437 (1965)

Honorable Howard M. Garrett  
Representative, Jefferson County (2nd Dist)  
Missouri House of Representatives  
715 Delmar  
Festus, Missouri

Honorable Donald D. Davis  
Representative for Webster County  
Missouri House of Representatives  
Niangua, Missouri

Honorable Ruben A. Schapeler  
Representative for Bates County  
Missouri House of Representatives  
607 West Dakota  
Butler, Missouri



Gentlemen:

Your request for an opinion on labor organizations and their relations, under our present law, to municipal corporations has been carefully considered. Specifically you asked:

(1) Whether the word "negotiation", found in Section 105.520 RSMo Cum. Supp. 1965, should be interpreted as meaning "collective bargaining";

(2) Whether the phrase "shall be reduced to writing" found in Section 105.520, supra, means to enter into a contract (with a union) and



Rep. Garrett, Davis and Schapeler:

(3) Must a public body enter into negotiations with a union if its employees are represented by that labor organization?

At the outset this office acknowledges with thanks and appreciation the invaluable assistance that counsel and officials of both labor organizations and public bodies have given us in the form of expression of views and ideas and in the form of extensive legal research and memoranda.

In this opinion, although not comprehensive of all possible questions that may or could arise under these statutes, we will nevertheless undertake to discuss some of the apparent problems that arise.

For convenience, the pertinent portions of the Constitution of Missouri and the statutes are set forth below:

"Article I, Section 29 - Organized labor and collective bargaining --That employees shall have the right to organize and to bargain collectively through representatives of their own choosing."

"105.500 - 'Public body', defined --As used in sections 105.500 to 105.530, 'public body' means the state of Missouri or any officer, board or commission of the state, or any other political subdivision of or within the state."

"105.510 - Public employees may join labor organizations and bargain collectively -- exceptions-- not to be discharged or discriminated against.-- Employees except police, deputy sheriffs, Missouri state highway patrol, Missouri national guard, all teachers of all Missouri schools, colleges and universities, of any public body shall have the right to form and join labor organizations and to present proposals to any public body relative to salaries and other conditions of employment through representatives of their own choosing. No such employee shall be discharged or discriminated against because of his exercise of such right, nor shall any person or group of persons, directly or indirectly, by intimidation or coercion, compel or attempt to compel any such employee to join or refrain from joining a labor organization."

Rep. Garrett, Davis and Schapeler:

"105.520 -- Public bodies may negotiate with labor organizations. --Any public body may engage in negotiations relative to salaries and other conditions of employment of the public body employees, with labor organizations. Upon the completion of negotiations the results shall be reduced to writing and presented to the governing or legislative body in the form of an ordinance or resolution for appropriate action."

"105.530 - Law not to be construed as granting right to strike.-- Nothing contained in sections 105.500 to 105.530 shall be construed as granting a right to employees covered hereby to strike."

It is noted that the statutes set out above are new in this state and were first enacted in 1965 (Laws 1965 p --S.B. No. 112, 73rd General Assembly). We have no judicial precedent in this state on the interpretation of these statutes.

In March 1957, this office issued Attorney General Opinion No. 68, to Honorable W. H.S. O'Brien, wherein we held that:

(1) Employees of a county highway commission may organize a labor union;

(2) A county court lacks the power to enter into a collective bargaining with a labor union representing the employees; and

(3) A county court lacks the power to enter into and execute a contract of employment with a labor union representing the employees of a county highway commission.. (A copy of the opinion is attached).

A reading of the opinion clearly establishes that its result is bottomed on an en banc decision of the Missouri Supreme Court decided in 1947 and styled as the City of Springfield v. Clouse, et al, 206 S.W. 2d 539. Because of its importance to the problem and to establish a precedent (at least as to the law prior to 1965) we shall quote extensively from it. We believe this opinion to be declaratory of law under our Missouri Constitution and relevant to your current questions. The court said:

Rep. Garrett, Davis and Schapeler:

"\* \* \*All citizens have the right, preserved by the First Amendment to the United States Constitution and Sections 8 and 9 of Article I of the 1945 Missouri Constitution, Sections 14 and 29, Art. 2, Constitution of 1875, to peaceably assemble and organize for any proper purpose, to speak freely and to present their views and desires to any public officer or legislative body. Employees had these rights before Section 29, Article I, 1945 Constitution was adopted. \* \* \*"  
(l.c. 542)

"\* \* \*Nevertheless, the organization and activity in organizations of public officers and employees is subject to some regulation for the public welfare. See United Public Workers v. Mitchell, 330 U. S. 75, 67 S.Ct. 556, 91 L. Ed. --; Oklahoma v. United States Civil Service Commission, 330 U.S. 127, 67 S.Ct. 544, 91 L.Ed. --; King v. Priest, Mo. Sup., 206 S.W. 2d 547, and cases therein cited. This is because a public officer or employee, as a condition of the terms of his public service, voluntarily gives up such part of his rights as may be essential to the public welfare or be required for the discipline of a military or police organization.

[3] Therefore, we start with the proposition that there is nothing improper in the organization of municipal employees into labor unions; and that no new constitutional provisions were necessary to authorize them. However, collective bargaining by public employees is an entirely different matter.  
\* \* \*"(l.c. 542)

"Indeed defendants' counsel recognize (as did the sponsors of Section 29 in the Constitutional Convention) that wages and hours must be fixed by statute or ordinance and cannot be the subject of bargaining. In the argument in this case, en banc, it was conceded that a city council cannot be bound in any such bargaining; that it must provide the terms of working conditions, tenure and compensation

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by ordinance; and that it likewise by ordinance may change any of them the next day after they have been established." (l.c. 543)

\* \* \* \* \*

"This is confusing collective bargaining with the rights of petition, peaceable assembly and free speech. Certainly public employees have these rights for which Mr. Wood was contending; and can properly exercise them individually, collectively or through chosen representatives, subject, of course, to reasonable legislative regulation as to time, place and manner in the interest of efficient public service for the general welfare of all the people. However, persons are not engaging in collective bargaining when they tell their senator, representative or councilman what laws they believe they should make. Neither are they engaging in collective bargaining with executive or administrative officers when they urge them to exercise discretionary authority within standards and limits which they have received or must receive from the legislative branch, or ask them to make recommendations to the legislative branch for further legislation." (l.c. 543)

"\* \* \* But legislative discretion cannot be lawfully bargained away and no citizen or group of citizens have any right to a contract for any legislation or to prevent legislation. The only field in which employees have ever had established collective bargaining rights, to fix the terms of their compensation, hours and working conditions, by such collective contracts, was in private industry. " (l.c. 543)

\* \* \* \* \*

"\* \* \* Thus the Convention did not settle the matter of public employees in labor organizations and their functions in governmental relations but left the matter to the legislature and the courts. While these debates are instructive as to the background and development of this proposal, nevertheless what was submitted to the people for adoption was Section 29 and not any delegate's speech about it. See Adamson v. People of State of California, 67 S.Ct. 1672, 91 L.Ed. --, and concurring opinion of Justice

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Frankfurter, 67 S.Ct. loc.cit. 1682; see also Household Finance Corporation v. Shaffner, Mo. Sup., 203 S.W. 2d 734, loc.cit. 737. Furthermore, the people voted on the adoption of an entire Constitution so that Section 29 must be construed in connection with all the provisions of the Constitution of which it is a part, many of which have long been essential parts of our basic law." (l.c. 544)

"\* \* \*The principle of separation of powers is stated in Article II, Art. III, 1875 Const., which provides that 'the powers of government shall be divided into three distinct departments \* \* \*each of which shall be confided to a separate magistracy'; and that 'no person, or collection of persons, charged with the exercise of powers properly belonging to one of these departments, shall exercise any power properly belonging to either of the others.' This establishes a government of laws instead of a government of men; a government in which laws authorized to be made by the legislative branch are equally binding upon all citizens including public officers and employees. The legislative power of the state is vested in the General Assembly by Section 1 of Article III. Sec. 1, Art. IV. 1875 Const. The members of the legislative branch represent all the people, and speak with the voice of all of the people, including those who are public officers and employees. In the exercise of their legislative powers, they must speak through laws which must be equally binding upon all and not through contracts. Even the making of public contracts must be authorized by law. See Sec. 39(4) Article III, 1945 Const., Sec. 48, Art. IV, 1875 Const. Laws must be made by deliberation of the lawmakers and not by bargaining with anyone outside the lawmaking body. These same governmental principles and constitutional provisions apply also to municipalities because their legislative bodies exercise part of the legislative power of the state. See City of Springfield v. Smith, 322 Mo. 1129, 19 S.W. 2d 1; Ex parte Lerner, 281 Mo. 18, 218 S. W. 331 and cases cited; see also Sections 6613-6617 as to legislative powers of the city council of second class cities. The City's organization and powers come from the General Assembly which is authorized by Section 15, Article VI, Sec. 7, Art. IX, 1875 Const. to provide for the organization

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and classification of cities and towns with the limitation that 'the number of such classes shall not exceed four; and the powers of each class shall be defined by general laws so that all such municipal corporations of the same class shall possess the same powers and be subject to the same restrictions.' It is inconceivable that the Constitutional Convention intended to invalidate all of the statutes, enacted through the years under this authority, concerning the operation of municipalities in fixing and regulating compensation, tenure, working conditions and other matters concerning public officers and employees.

[8,9] Under our form of government, public office or employment never has been and cannot become a matter of bargaining and contract. State ex rel. Rothrum v. Darby, 345 Mo. 1002, 137 S.W. 2d 532; see also Nutter v. City of Santa Monica, 74 Cal. App.2d 292, 168 P.2d 741, loc.cit. 745; Miami Water Works Local No. 654 v. City of Miami, 157 Fla. 445, 26 So. 2d 194, loc.cit. 197, 165 A.L.R. 967; Mugford v. Mayor and City Council of Baltimore, 185 Md. 266, 44 A.2d 745, loc.cit. 747, 162 A.L.R. 1101. This is true because the whole matter of qualifications, tenure, compensation and working conditions for any public service, involves the exercise of legislative powers. Except to the extent that all the people have themselves settled any of these matters by writing them into the Constitution, they must be determined by their chosen representatives who constitute the legislative body. It is a familiar principal of constitutional law that the legislature cannot delegate its legislative powers and any attempted delegation thereof is void. 11 Am.Jur. 921, Sec 214; 16 C.J.S. Constitutional Law, §133; A.L.A. Schechter Poultry Corporation v. United States, 295 U.S. 495, 55 S.Ct. 837, 79 L.Ed. 1570, 97 A.L.R. 947. If such powers cannot be delegated, they surely cannot be bargained or contracted away; and certainly not by any administrative or executive officers who cannot have any legislative powers. Although executive and administrative officers may be vested with a certain amount of discretion and may be authorized to act or make regulations in accordance with certain fixed standards, nevertheless the matter of making such standards involves the exercise of legislative powers. Thus qualifications,



tenure, compensation and working conditions of public officers and employees are wholly matters of lawmaking and cannot be the subject of bargaining or contract. Such bargaining could only be usurpation of legislative powers by executive officers; and, of course, no legislature could bind itself or its successor to make or continue any legislative act. \* \* \* (l.c. 544, 545)

"\* \* \*The question involved herein is a question of power rather than one of what function is involved. 'Missouri cities have or can exercise only such powers as are conferred by express or implied provisions of law; their charters being a grant and not a limitation of power, subject to strict construction, with doubtful powers resolved against the city.' Taylor v. Dimmit, 336 Mo. 330, 78 S.W. 2d 841, 843, 98 A.L.R. 995. Fixing compensation, hours and tenure require the exercise of legislative powers in exactly the same way for all employees of the City, whether governmental or corporate, at least under the organization of second class cities in this state.\* \* \* (l.c. 546)

A close reading of the Clouse case establishes a parallel between that case and the present statutes in our opinion. In support of this view, we cite a recognized canon of statutory construction that when a court of last resort has declared the law, the General Assembly is presumed to be aware of that declaration when it adopts an enactment on the same subject (Mack Motor Truck Corporation v. Wolfe, 303 S.W. 2d 697, 700; Jacob v. Missouri Valley Drainage District, 163 S.W. 2d 930, 939). The court, in the Wolfe case, supra, said:

"[4-7] The General Assembly must be presumed to have been aware of the state of the common law relating to the priority of a Missouri artisan's common-law lien over all recorded Missouri chattel mortgages, as declared by the Kirtley case and others, when it enacted Sections 430.010 - 430.050, V.A.M.S., creating the statutory lien. For when a court of last resort has declared the law, the General Assembly is presumed to be aware of that declaration when it adopts an enactment on the same subject. \* \* \*"

Rep. Garrett, Davis and Schapeler

We conclude therefore the General Assembly did have in mind and intended to adopt the principles enunciated in the Clouse case. It is our opinion that the Clouse case defines and sets forth the constitutional framework upon which the legislature did construct the present legislation.

The word 'negotiate' is defined in Websters New International Dictionary (2nd Ed) P. 1638: "To hold intercourse or treat with a view to coming to terms upon some matter, as a purchase or sale, a treaty etc; to conduct communication or conferences as a basis of agreement."

"Negotiation"; "Act or process of negotiating; a treating with another with a view of coming to terms as for a sale or purchase or in international affairs;" Our common understanding of the word "negotiate" is "talk" "communicate" or engage in a dialogue respecting particular subject matters. We have found nothing to mean that the word "negotiation" means more than the parties meet together to discuss their differences with a view of reaching an understanding.

As used in the statutes (Section 105.520, supra), we find the words "Any public body may engage in negotiation. \* \* \*"

"An accepted dictionary definition of 'may' is 'permission'. Permission to do a thing is not a requirement or order that it be done." (Byers Bros. Real Estate and Insurance Agency v. Campbell, 353 S.W. 2d 102, 108).

The Missouri Supreme Court in State v. Wymore, 119 S.W. 2d 941, 944, has this to say about the words, "may" and "shall":

"\* \* \*On reading the article it will be noted that the words 'may' and 'shall' are used many times in the several sections. They were used advisedly and must be given their usual and ordinary meaning. It is the general rule that in statutes, the word 'may' is permissive only and the word 'shall' is mandatory. \* \* \*"

Accordingly, we believe that a public body or its representatives in its discretion, may negotiate with a labor organization. It is not required to do so since the word, may, is permissive and certainly it is not required to engage in negotiations. There is no language that indicates that negotiations may be equated with "collective bargaining". "Collective bargaining" results in an accord which

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will result in an agreement as to terms which will govern the many inter-related problems between the employer and the employee. See our opinion, Attorney General No. 68, dated March 15, 1957, to Honorable W.H. S. O'Brien, supra.

It has been urged by some that the words, "shall have the right to form and join labor organizations and to present proposals to any public body," (Found in Section 105.500) should be taken to mean that the labor group or union shall (used in mandatory sense) engage in collective bargaining with a public body. We cannot agree. It does mean, in our opinion that the employees have the absolute right to organize and the group shall have the right to present or petition any public body for redress of their grievances. This constitutes no more than a recognition or restatement by the legislature of the constitutional rights of a citizen "to peaceably assemble and organize for any proper purpose, to speak freely and to present their views and desires to any public officer or legislative body." (Springfield v. Clouse, 1.c. 542).

We conclude therefore that a representative of a public body may in its discretion, meet with a representative of employees but not for collective bargaining as that term is commonly understood but to discuss problems or disputes respecting public body employee relationships.

Regarding your second question, Section 105.520, supra, reads in pertinent parts --

"\* \* \*Upon completion of the negotiations, the results shall be reduced to writing and presented to the governing or legislative body in the form of an ordinance or resolution for appropriate action."

The basic guide for the interpretation of any statute is to seek the lawmakers' intention for the whole act; and, if possible, to effectuate that result. Words should be given their plain, ordinary meaning to promote the object and purpose of the statute. (Julian v. Mayer, et al, 391 S.W. 2d 864; May Department Store v. Weinstein, 395 S.W. 2d 525).

We believe labor relations in the public employment field are distinct and quite different from the procedures found in private industry. In private industry, both parties engage in a

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process of collective bargaining with an ultimate goal of a valid agreement, enforceable at law, between unions representing the employees and the employer. In the field of labor relations involving public employment, the purpose of "negotiations" is to decide if joint recommendations can be arrived at between the representatives to be presented to the principals of the parties. If so, this understanding is then reduced to the form of an ordinance or resolution to be submitted to the legislative or governing body of the public body "for appropriate action". Such action might be to affirm, modify or deny, and would be unilateral in character. This procedure affords due process required in the Clouse case and recognition of the "separation of powers" doctrine. In public employment the relation between employer and employee may be altered because of changes in legislation or rules at any time. In private industrial relations, contracts defining employer--employee relations normally are for a given period and binding on both parties under the contract provisions.

We conclude, that a public body, in its discretion, may (used in a permissive connotation) negotiate with a representative of the employees. Although understanding is not required, if an understanding is reached, the results shall (used in a mandatory sense) be reduced to writing and presented to the governing or legislative body in the form of an ordinance or resolution for acceptance, rejection, modification or other appropriate action by the public body. This does not mean that when the understanding is reduced to writing, that the public body shall (used in a mandatory sense) enter into a contract but only that the written understanding will be presented to the governing or legislative body of the public body in the form of an ordinance or resolution for appropriate action. (See Springfield v. Clouse, supra). The governing or legislative body may unilaterally take whatever action, in its discretion, that it deems appropriate (Springfield v. Clouse, supra).

Respecting your third question, a public body has or can exercise only such powers as are conferred by express or implied provisions of law. (Springfield v. Clouse, supra). We have herein discussed the grant of authority to "negotiate" with representatives of employees as being permissive, we conclude that a public body may, in its discretion, enter into negotiations.

This opinion undertakes to respond to the inquiries propounded in your request. There are a number of other facets of this problem, however, that should be recognized and at least to some extent considered.

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Among these problems is the meaning of "public body". Section 105.500, RSMo Cum. Supp. 1965, defines public body as meaning "the State of Missouri or any officer, board or commission of the state, or any other political subdivision of or within the state." This immediately raises a number of very vexing questions. For example, are state colleges and universities included or excluded from the ambit of Senate Bill 112 (Section 105.500 to 105.530, RSMo Cum. Supp. 1965). It will be observed that Section 105.510 commences as follows:

"Employees except police, deputy sheriffs, Missouri state highway patrol, Missouri national guard, all teachers of all Missouri schools, colleges and universities, of any public body shall have the right to form and join labor organizations \* \* \*"

It will be observed that the language above referred to commencing with the second word in the section, the word "except" - to and including "universities" may be exceptions or exclusions from the coverage of that section of the statute. It therefore appears that the use of the words colleges and universities in the exception clause would mean that although a state college or state university may be a public body within the meaning of Section 105.500 their employees are excluded from the operation of Section 105.510. On the other hand the clause "all teachers of all Missouri schools, colleges and universities" may be read as a single thought. That is, that the subject of the clause is "teachers" and that the exclusion is intended to refer to teachers of all Missouri schools including as an exception teachers of colleges and universities. We believe that the latter view is the one intended by the legislature. This presents a most anomalous and ambiguous situation in the construction of this statute. We believe that the latter view is the one intended by the legislature. That is, that only "teachers" are intended to be excluded in Section 105.510.

Even though it may be argued that the term colleges and universities is not applicable to Section 105.510, yet Section 105.520 may be applicable to colleges and universities. With respect, however, to the problem of the University of Missouri there is a further complication respecting the provision of Section 9(a) Article IX of the Constitution which provides "The government of the State University shall be vested in a board of curators consisting of nine members appointed by the governor, by and with the advice and consent of the senate." This raises some very serious and perplexing questions as to what statutes, if any, passed by the Legislature are applicable to the State University.

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Nevertheless, we have been unable to find any constitutional or other legal impediment that would deny the power or authority to the Board of Curators of the University of Missouri to voluntarily negotiate with its employees.

One of the next problems that arises is what political subdivisions are included within the meaning of public body? Section 105.500 defines public body and provides:

"As used in sections 105.500 to 105.530, 'public body' means the state of Missouri or any officer, board or commission of the state, or any other political subdivision of or within the state."

We find no particular difficulty in determining that a public body includes department heads of the State of Missouri, and all of the many Boards and Commissions of the State which have been established pursuant to law.

This leaves a vast area of other political and municipal corporations in which there may be doubt as to whether they are a "political subdivision of or within the state". In some situations the Courts have held cities not a political subdivision of the state (See Article V, Section 3 Constitution, and cases cited 2 VAMS page 31, et seq.). On the other hand the Courts have held cities to be political subdivisions under Article X, Section 15 of the Constitution. This however can be explained because the definition there expressly includes cities as well as other types political and municipal corporations. Again under the nepotism provision of the 1875 Constitution the Supreme Court held that political subdivisions included cities (Const. 1875, Article XIV, Section 13) (State ex rel v. Ferguson, 64 S.W. 2d 97). This may have been one reason for the change in the language of the nepotism provision in the 1945 Constitution (Article VII, Section 6).

While we recognize many technical difficulties in construing "political subdivision of or within the state" to include cities we nevertheless incline to the view that the legislature was not viewing the terms in their narrower sense but in their broader and more comprehensive sense. It is therefore our view that the legislature intended "political subdivision" to include cities, towns and villages.

We do not overlook the limitations placed upon the legislature and possibly to this Act now under consideration by Section 22 of



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of Article VI applica e to Constitutional Charter Cities. The impact of this constitutional provision upon this Act will need to await further clarification by the Courts under facts yet to arise.

With respect to the application of political subdivision to school districts we again encounter many of the same difficulties observed above with respect to cities. No reason, however, has come to our attention why the same principles are not applicable. We therefore conclude that school districts are within the meaning of political subdivision.

That area commonly known as labor relations negotiations between labor and management usually encompasses the broad area often referred to as "Wages, hours and conditions of employment" include among them the following without attempting to be all inclusive; wages, hours of employment, seniority, vacation, sick leave, hiring, discharge and discipline, sanitary conditions, promotion, lay off, work assignment, classification, skill and experience, pensions, insurance and many others. It is well known that this is merely a partial listing of the many areas in which employer and employee negotiations are conducted. Because the power and authority of public officials and public bodies are so limited and circumscribed by law it is manifestly impossible to lay down broad lines for guidance on each of these various subjects. Each topic must be considered in the light of the express and implied statutory authority which the public officials and public bodies have in resolving misunderstandings, disputes or disagreements that exist between employees and each of the public bodies. By way of example, the subject of tenure. By and large most employees of the state can not have tenure because by law all employees of the state are employees "at will" and can not be subject to a contract for a term. Each area of employer and employee relations must therefore be considered in the light of the applicable law affecting that particular area.

#### CONCLUSIONS

This office concludes:

1. That a representative of a public body may in its discretion meet with a representative of employees and talk about problems of mutual interest. This does not include the right or power to engage in collective bargaining.

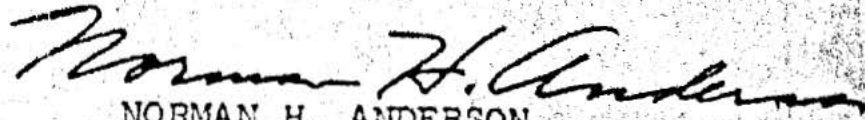
Rep. Garrett, Davis and Schapeler:

2. If an understanding is reached between representatives of the public body and representatives of the employees the understanding shall be reduced to writing, but does not constitute a contract, and shall be submitted to the public body for appropriate action.

Any public body has the right and power to discuss matters of mutual interest with its employees or their representatives.

The foregoing opinion which I hereby approve was prepared by my Assistant Richard C. Ashby.

Yours very truly,

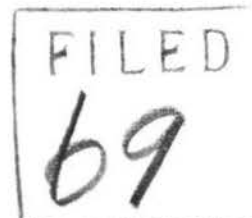
  
NORMAN H. ANDERSON  
Attorney General

DRIVERS LICENSES: The revocation of the operator's license  
DRIVERS LICENSE SUSPENSION: of one who has refused to take a chemical  
DRIVING WHILE INTOXICATED: breath test as provided in Sections 564.441  
MOTOR VEHICLES: and 564.444, RSMo Supp., 1965, may not be  
rescinded except for those reasons set out  
in paragraph 2 of Section 564.444 and is not  
affected by a subsequent finding of not guilty of a charge of driving  
while intoxicated under Section 564.440, RSMo Supp., 1965.

OPINION NO. 438 (1965)  
OPINION NO. 69 (1966)

February 28, 1966

Honorable Thomas A. David, Director  
Department of Revenue  
Jefferson Building  
Jefferson City, Missouri



Dear Mr. David:

This is in answer to your request for an opinion of this office as to whether an order of the Director of Revenue revoking the license of a person who has refused to take a chemical breath test as provided by Section 564.444, RSMo Supp., 1965, is affected by a subsequent finding of not guilty of the charge of driving while intoxicated brought under Section 564.440, RSMo Supp., 1965.

Section 564.440, RSMo Supp., 1965, provides that no one shall operate a motor vehicle while in an intoxicated condition. Criminal penalties are provided for conviction thereof.

Section 564.444, RSMo Supp., 1965, provides that the Director of Revenue, after receiving a proper report, shall revoke the license of any person who has refused to submit to a chemical breath test as required by Section 564.441, RSMo Supp., 1965. Paragraph 2 of Section 564.444 provides that upon judicial review the only questions to be determined are:

- "(1) Whether or not the person was arrested;
- (2) Whether or not the arresting officer had reasonable grounds to believe that the person was driving a motor vehicle while in an intoxicated condition, and,
- (3) Whether or not the person refused to submit to the test."

Honorable Thomas A. David, Director

Although your question has not heretofore been ruled upon in this state, it has been considered in at least two other jurisdictions. In each case, the court found that the fact that a person may have been acquitted of the offense of driving while intoxicated does not preclude the revocation of his license by an administrative board for refusal to submit to a chemical test to determine the alcoholic content of his blood. *Prucha v. Department of Motor Vehicle, Neb.*, 1961, 110 N.W.2d 75, 88 A.L.R. 2d 1055; *Combes v. Kelly*, 1956, 152 N.Y.S.2d 934; *Anderson v. MacDuff*, 1955, 143 N.Y.S. 2d 257; Anno. 88 A.L.R.2d 1055, 1076.

The reasoning behind the ruling of these courts is that the statutes providing criminal convictions for drunken driving are entirely independent from statutes authorizing the Director of Revenue to revoke the license of one who refuses to take such a chemical test.

The former type statute is criminal in nature in which an accused is presumed to be innocent and the burden is upon the prosecution to establish his guilt beyond a reasonable doubt. The latter is an administrative proceeding by which a person's license to operate a motor vehicle is withdrawn. The operation of a motor vehicle, so these cases say, is a privilege not a right and may be withdrawn upon reasonable grounds. See *Barbieri v. Morris*, Mo.Supp., 315 S.W.2d 711.

Section 564.441, RSMo Supp., 1965 provides:

"Any person who operates a motor vehicle upon the public highways of this state shall be deemed to have given consent to, subject to the provisions of sections 564.441, 564.442 and 564.444, a chemical test of his breath for the purpose of determining the alcoholic content of his blood if arrested for any offense arising out of acts which the arresting officer had reasonable grounds to believe were committed while the person was driving a motor vehicle while intoxicated. \* \* \*"

Refusal to consent to a chemical breath test or other test to determine the alcoholic content of the blood has been held to constitute reasonable grounds sufficient to revoke a license. *Lee v. State*, Kan., 1961, 358 P.2d 765; *Ballou v. Kelly*, 1958, 176 N.Y.S.2d 1005. See also *Schutt v. MacDuff*, 1954, 127 N.Y.S.2d 116.

Honorable Thomas A. David, Director


The reasoning in the cases cited above would also be applicable to the Missouri statutes. Section 564.440, although amended in 1963, has been in existence in somewhat similar form for many years. Sections 564.441 and 564.444 were enacted by the 1965 Legislature. There is no evidence that the Legislature intended that a revocation under 564.444 would in any way be dependent upon the result of a prosecution under Section 564.440. Any such contention is refuted by the statute itself. Paragraph 2 of Section 564.444 enumerates the only questions that may be considered on review to determine the validity of the revocation.

#### CONCLUSION

For these reasons, it is the opinion of this office that the revocation of the operator's license of one who has refused to take a chemical breath test as provided in Sections 564.441 and 564.444, RSMo Supp., 1965, may not be rescinded except for those reasons set out in paragraph 2 of Section 564.444 and is not affected by a subsequent finding of not guilty of a charge of driving while intoxicated under Section 564.440, RSMo Supp., 1965.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. John H. Denman.

Yours very truly,

  
NORMAN H. ANDERSON  
Attorney General



OPINION NO. 70-REVISED (3-21-66)  
Answered by Letter-Denman



Honorable Thomas A. David, Director  
Department of Revenue  
Jefferson Building  
Jefferson City, Missouri

Dear Mr. David:

This is in answer to your request for an opinion of this office concerning the use of points assessed for out-of-state convictions of traffic violations under Section 302.160, RSMo Supp. 1965, before its revision by the 1965 Legislature.

Section 302.160 as amended provides:

"When the director of revenue receives notice of a conviction in another state, which, if committed in this state, would result in the assessment of twelve points, he is authorized to assess the points and revoke the operating privilege as provided in section 302.304."

Prior to its amendment, this section read:

"The director of revenue is authorized to suspend or revoke the license of any resident of this state upon receiving notice of the conviction of such person in another state of an offense therein which, if committed in this state, would be grounds for the suspension or revocation of the license of an operator or chauffeur." (Emphasis Ours)

At the time this Section was enacted, the so-called "point



Honorable Thomas A. David, Director

system" was not in effect. After the point system was enacted in 1961, Section 302.160, although not changed, was interpreted to mean that the proper number of points would be assessed for a conviction of an offense in another state, which, if committed in this state, would result in a corresponding point assessment.

In our opinion this interpretation was not justified by the language of Section 302.160 and was erroneous.

Under the point system a varying number of points are assessed for certain traffic violations. In Section 302.302, RSMo Cum. Supp. 1965, the Legislature has listed the offenses for which points shall be assessed and the number of points to be assessed for each offense. This number varies from one point for a minor offense to twelve points for several more serious offenses.

When a driver accumulates four points within a twelve month period he is so notified by the Director of Revenue. If he accumulates eight points within a twelve month period his license is suspended for a period of from thirty to ninety days. His license is revoked if he obtains or accumulates twelve points in twelve months, or eighteen points in eighteen months or twenty-four points in thirty-six months. Section 302.304, RSMo Cum. Supp. 1965.

There were no offenses with a point value of eight or more which would have been grounds for the suspension of a license. Thus, the only offenses committed in this state that initially were grounds, in and of themselves, for the revocation of the drivers license were those which carry a twelve point assessment value.

Section 302.160, before its amendment, did not provide for the assessment of points but only for suspension or revocation of a license, and then only upon receiving notice of a conviction in another state which, if committed in this state, would be grounds for suspension or revocation. It must follow that the Director could consider only those out-of-state convictions which, if committed in this state, would have required a twelve point assessment and an automatic revocation of the license. Out-of-state convictions of a lesser point value were not grounds for suspension or revocation of a license. Therefore, the assessment of points for such lesser offenses was not authorized and these points should not be considered in computing the number of points accumulated by an individual driver.

This conclusion is strengthened by the amendment to Section 302.160 in 1965 which clearly indicates the intention of the Legislature that only twelve point out-of-state assessments should be considered.

Honorable Thomas A. David, Director

CONCLUSION

It is the opinion of this office that prior to October 13, 1965, the effective date of the amendment to Section 302.160, RSMo 1965, the Department of Revenue was not authorized to assess points for traffic offenses committed outside the state unless such offense, if committed in this state, would have resulted in the assessment of twelve points. Any points assessed for violations in other states in lesser amounts should not be considered in computing the number of points accumulated by an individual driver.

Yours very truly,

NORMAN H. ANDERSON  
Attorney General

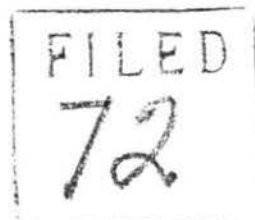
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AUTOMOBILES:  
DRIVERS LICENSES:  
LICENSES:  
MOTOR VEHICLE EQUIPMENT:  
MOTOR VEHICLES:

A conviction for operating a motor vehicle without headlights or taillights or with no stop or brake lights or with defective or inadequate brakes is for a violation of a vehicle equipment provision and is excepted from the assessment of points under Section 302.302-1 (1).

OPINION NO. 441 (1965)  
OPINION NO. 72 (1966)

March 17, 1966



Honorable Thomas A. David, Director  
Department of Revenue  
Jefferson Building  
Jefferson City, Missouri

Dear Mr. David:

This is in answer to your request for an opinion of this office regarding the interpretation of subparagraph (1) of paragraph 1, Section 302.302, RSMo Supp., 1965, which request reads in part as follows:

"Please advise us if the wording in subparagraph (1) 'Other than a violation of vehicle equipment provisions' should be construed to mean that subsequent to the amendment of the law points should not be entered on the record of a licensee for convictions of:

- a. Operating without head lights or without tail lights when lights are required.
- b. Operating with no stop or brake lights.
- c. Operating with defective, or inadequate, or no brakes."

The Section to which you refer, Section 302.302, RSMo Supp., 1965, so far as here pertinent, provides:

"1. The director of revenue shall put into effect a point system for the suspension and revocation of chauffeurs' and operators' licenses. Points shall be assessed only after a conviction or forfeiture of collateral. The initial

Honorable Thomas A. David, Director

point value is as follows:

(1) Any moving violation of a state law or county or municipal ordinance not listed in this section other than a violation of vehicle equipment provisions. . . . . 2 points (except any violation of a municipal stop sign ordinance where no accident is involved, 1 point)"  
(Emphasis added)

The emphasized portion of this statute was added by the amendment in 1965.

Prior to this amendment two points were assessed for these violations under paragraph 1 (1) as they were considered moving violations. Your question is whether they are now excepted as a violation of vehicle equipment provisions.

Various traffic and equipment regulations are enumerated in Chapter 304, RSMo. Sections 304.012 to 304.260 are grouped under the heading "general provisions" and include certain traffic regulations and size and weight limitations for motor vehicles. Sections 304.270 to 304.420 grouped under the heading "light regulations" include the various regulations controlling vehicle lighting equipment. Included within this group are the requirements that automobiles shall be equipped with proper headlights, Sections 304.310 and 304.320 and taillights, Section 304.400. Sections 304.490 to 304.570 are grouped under the heading "equipment" and include various requirements as to safety glass and also Section 304.560 entitled "Other equipment of motor vehicles." Paragraph 3 of this last section requires all motor vehicles to be provided at all times with two sets of adequate brakes kept in good working order. Criminal sanctions are provided for violation of all of these provisions. We have been unable to find any state law proscribing the operation of a motor vehicle with no stop or brake lights and presume that any conviction for this offense is a violation of a local ordinance.

The offenses which you question other than operating with no stop or brake lights are all found in Chapter 304 and all relate to equipment regulations. By amending the statute as they did the legislature obviously intended to except violations which had

Honorable Thomas A. David, Director

previously been assessed. Since the clause in question provides for an assessment for moving violations "Other than a violation of motor vehicle equipment provisions," a departmental construction which would cause an assessment for violation of some equipment provisions not others, would amount to an authorized discrimination.

The failure to have stop and brake lights would also seem to be an equipment violation. Even though there is no state statute requiring their use, a conviction for violation of a local ordinance should also be excepted from assessment as a moving violation.

Our conclusion that convictions of these various offenses are not assessable as moving violations does not render paragraph 1 (1) meaningless as there are many moving violations other than for faulty equipment which are not covered in the other subparagraphs of Section 302.302-1 for which two points may be assessed.

Your second question is being answered by another opinion which we will send you a copy of as soon as it has been prepared and approved.

#### CONCLUSION

For the reasons stated, it is the opinion of this office that a conviction for operating a motor vehicle without headlights or taillights or with no stop or brake lights or with defective or inadequate brakes is for a violation of a vehicle equipment provision and is excepted from the assessment of points under Section 302.302-1 (1).

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. John H. Denman.

Very truly yours,



NORMAN H. ANDERSON  
Attorney General



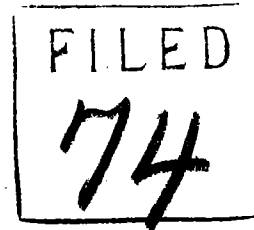
CITIES:  
INCORPORATION OF CITIES:  
COUNTIES, FIRST AND  
SECOND CLASS:

Section 72.085, RSMo Cum. Supp. 1965  
provides an alternative method of  
incorporating cities in First and  
Second Class Counties having charter  
form of government.

March 17, 1966

OPINION NO. 74 1966  
443 1965

Honorable Donald J. Gralike  
Missouri House of Representatives  
Capitol Building  
Jefferson City, Missouri



Dear Representative Gralike:

This is in response to your request for an opinion from this office, which request asks - Does the passage of Section 72.085, RSMo Cum. Supp. 1965, provide the only means of incorporation for unincorporated areas of land in any second class county or first class county having a charter form of government.

Section 72.080, RSMo 1959, provides in part:

"Any city or town of the state not incorporated may become a city of the class to which its population would entitle it under this chapter, and be incorporated under the law for the government of cities of that class, in the following manner: Whenever a majority of the inhabitants of any such city or town shall present a petition to the county court of the county in which such city or town is situated, setting forth the metes and bounds of their city or town and commons and praying that they may be incorporated, and a police established for their local government, and for the preservation and regulation of any commons appertaining to such city or town, and if the court shall be satisfied that a majority of the taxable inhabitants of such town have signed such petition, the court shall declare such city or town incorporated, designating



Honorable Donald J. Gralike

in such order the metes and bounds thereof, and thenceforth the inhabitants within such bounds shall be a body politic \* \* \*"

Section 72.085, RSMo Cum. Supp. 1965, subsections 1, 2 and 3 states:

"1. Other provisions of law notwithstanding, any unincorporated area of land in any second class county or first class county having a charter form of government may become a city of the class to which its population would entitle it, as provided in this chapter, and be incorporated in the manner provided by this section.

"2. Incorporation proceeding may be instituted by the filing of a petition with the governing body of such county. The petition shall be signed by ten per cent of the registered voters in the area, shall describe, by metes and bounds, the area to be incorporated and be accompanied by a plat thereof, shall state the approximate population and the assessed valuation of all real and personal property in the area and shall state facts showing whether or not the incorporation is reasonable and necessary to the proper development of the area, the ability of the proposed city to furnish normal municipal services in the area within a reasonable time after its incorporation is to become effective and whether or not the incorporation is in the interest of such county as a whole.

"3. After public hearing and review of the proposed incorporation, the governing body of the county may, by ordinance or order, approve or disapprove the petition in whole or in part, with or without amendment, including, but not limited to, increasing or decreasing the area to be incorporated, and upon such approval shall submit the proposal for incorporation to the qualified voters in the area proposed to be incorporated. The governing body of the county in such ordinance or order shall set the date

Honorable Donald J. Gralike

for such election at any special, primary or general election not less than sixty days after the enactment of the ordinance or order. The election official or officials in charge of elections in such county shall submit the proposed incorporation at the election by ballot substantially in the form set forth in the ordinance or order calling the election. If the proposed incorporation is approved by a majority of the voters voting thereon in the area to be incorporated, the city shall thereupon be incorporated. If a majority of those voting thereon vote against the incorporation the proposal shall be defeated and no new petition for incorporation of the same or substantially the same area may be filed until one year after the election. Within sixty days after any election approving an incorporation the governing body of the county shall by ordinance declare that city incorporated, shall designate the metes and bounds, the class and the name thereof and shall designate the officers of the city who shall hold office until the first general election of officers, as provided by law and until their successors shall be duly elected and qualified. Thenceforth such city shall be a body politic and corporate, possessed of all the powers and subject to all laws pertaining to its class. Failure of the governing body of the county to act upon any petition for incorporation within ninety days after it has been filed shall be deemed a denial thereof." (Underscoring supplied)

To give meaning to a statute, "a primary rule of construction is that we attempt to ascertain the intentions of the General Assembly. This is to be found, if possible, by faithfully giving the language of the act its plain and rational meaning, if it can be done. In making that determination, we must consider and give weight to the object sought to be accomplished; the meaningful purpose of the act and we avoid, if possible any construction which will lead to absurd or unreasonable results." State vs. Tuskin, 322 SW 2d 179, 183.

Honorable Donald J. Gralike

We must examine the language in Section 72.085, supra, to determine the meaning of this section. Subsection 1, of Section 72.085, supra, contains the following opening phrase: "Other provisions of the law, notwithstanding." "Notwithstanding" has been defined as "Without prevention or obstruction from or by; in spite of." State ex rel Carmean vs. Board of Education of Hardin County, 165 NE 2d 918,923, 170 Ohio St. 415.

By putting the above mentioned definition in place of the word "notwithstanding", we arrive at the following:

In spite of, or without prevention or obstruction by or from other provisions of law, any unincorporated area of land in any second class county or first class county having a charter form of government may become a city of the class to which its population would entitle it as provided in chapter 72 RSMo, and [may] be incorporated in the manner provided by this act. (Underlining and bracketed word added)

"As a general rule, the word 'may', when used in a statute, is permissive only and operates to confer discretion, especially where the word 'shall' appears in close juxtaposition in other parts of the same statute." C.J.S. Statutes, Section 380, p. 877.

The word "shall" does appear in the same statute as follows:

"2. Incorporation proceeding may be instituted by the filing of a petition with the governing body of such county. The petition shall be signed by ten per cent of the registered voters in the area, shall describe, by metes and bounds, the area to be incorporated and be accompanied by a plat thereof, shall state the approximate population and the assessed valuation of all real and personal property in the area and shall state facts showing whether or not the incorporation is reasonable and necessary to the proper development of the area, the ability of the proposed city to furnish normal municipal services in the area within a reasonable time after its incorporation is to become effective and whether or not the incorporation is in the interest of such county as a whole." (Underlining added)

Honorable Donald J. Gralike

Considering the use of the word "may" in Section 72.085, supra, with the definition of "notwithstanding", supra, the logical conclusion is that the Legislature intended Section 72.085 to be an alternative procedure for incorporation of cities in second class counties and first class counties having a charter form of government.

Sections 72.080 and 72.085 are positioned in the same chapter dealing with incorporation of unincorporated areas, except that Section 72.085 deals specifically with first and second class counties. There is no express language in Section 72.085, repealing Section 72.080. The title of the act which enacted Section 72.085 was "An Act relating to the incorporation of cities in first class counties having a charter form of government and second class counties."

In *Curators of Central College vs. Rose*, 182 SW 2d 145, 150, the Court states:

" ' All consistent statutes relating to the same subject, and hence briefly called statutes in pari materia, are treated prospectively, and construed together as though they constituted one act. This is true whether the acts relating to the same subject were passed at different dates, separated by long or short intervals, at the same session, or on the same day" *Suth. St. Const* § 283. \* \* \* "Where enactments separately made are read in pari materia, they are treated as having formed, in the minds of the enacting body parts of a connected whole, though considered by such a body at different dates, and under distinct and varied aspects of the common subject. Such a principle is in harmony with the actual practice of legislative bodies, and is essential to give unity to the laws and connect them in a symmetrical system. Such statutes are taken together and construed as one system, and the object is to carry into effect the intention. It is to be inferred that a code of statutes relating to one subject was governed by one spirit and policy, and was intended to be consistent and harmonious in its several parts and provisions." (*Ib.*, Sec. 288). "

Honorable Donald J. Gralike

Considering the time sequence, Section 72.080 precedes Section 72.085. Section 72.080 deals with all unincorporated areas wishing to incorporate. Section 72.085 came into law at a later time and provides in spite of or without prevention or destruction from or by other provisions of law, unincorporated areas of land in second class counties or first class counties having a charter form of government, may become a city of the class to which its population would entitle it. And in *In re Dugan*, 309 SW 2d 137,143 the Court states:

"In construing these statutes we must of course attempt to ascertain the intention of the legislature (*Christy v. Petrus*, 365 Mo. 1187, 295 SW 2d 122) and to determine (and promote) the object and purpose of that intention from the words used in the statute (*Browder v. Milla*, Mo. App., 296 SW 2d 502). In so doing we must, if possible, give effect to every word, phrase, clause, and sentence of the section. *Pree v. Board of Trustees*, 363 Mo. 1131, 257 SW 2d 685. And we must also put together and harmonize, if possible, all sections which are related to the same subject. *Bredeck v. Board of Education of City of St. Louis*, Mo. App., 213 SW 2d 889. The entire legislative act must be considered. *McCord v. Missouri Crooked River Backwater Levee Dist.*, Mo., 295 SW 2d 42. In this connection we may consider the historical development of the legislation. *State ex rel. Smith v. Attervury*, 364 Mo. 963, 270 SW 2d 399, 405. For the new legislation must be construed and applied consistently with the construction placed upon the related parts of the general law. See *Fiske v. Buder*, 8 Cir., 125 F. 2d 841, 845. And 'in the construction and application of a statute, we must harmonize the same, if possible, with the established law existing at the time of enactment unless there is a conclusive implication, or an expressed intent to repeal the old and enact a new.' *Mayes v. Mayes*, Mo. App., 104 SW 2d 1019, 1023."

Honorable Donald J. Gralike


There is no conclusive implication or expressed intent to repeal the "old" and enact the "new". The term "notwithstanding" as used in Section 72.085 and the words "may" and "shall" although ambiguous, can be interpreted and harmonized with the language of Section 72.080. When this is done the inevitable conclusion is that the General Assembly intended Section 72.085 to be an alternative method of incorporation for those unincorporated areas specifically covered by that language.

CONCLUSION

Therefore it is the opinion of this office that Section 72.085 RSMo Cum. Supp 1965, provides an alternative method for incorporation of unincorporated areas of land in any second class county or first class county having a charter form of government.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, J. Gordon Siddens.

Yours very truly,



NORMAN H. ANDERSON  
Attorney General



ARREST:  
CITIES, TOWNS AND VILLAGES:

A police officer of a third class city can make an arrest under authority of a warrant issued by such city at any place within the limits of the county within which the city is located.

June 2, 1966

Op. No. 75 (1966)  
No. 445 (1965)

Honorable J. R. Fritz  
Prosecuting Attorney of Pettis County  
Courthouse  
Sedalia, Missouri



Dear Mr. Fritz:

This is in answer to your request for an opinion concerning the question of whether a police officer of a third class city can make an arrest under authority of a warrant issued by such city outside the territorial limits of the city. Your request suggests some conflict between Section 85.561, RSMo 1959, and Supreme Court Rule No. 37.12.

Section 85.561, supra, enacted in 1955 relating to third class cities reads in part as follows:

" \* \* \* Every member of the police department is also empowered to serve and execute all warrants, subpoenas, writs or other process issued by the police judge of the city at any place within the limits of the county within which the city is located."

Also Section 98.370, RSMo 1959, relating to third class cities reads as follows:

"All warrants issued by the police judge shall be directed to the city marshal, and such warrants may be executed by the marshal, assistant marshal or any policeman, at any place within the county in which the city is located. In case of the absence of the officer from the court, the police judge may deputize some person to execute any process issued by him."

The wording of the statutes are clear that police officers of a third class city can serve and execute warrants issued by the police judge of that city anywhere within the county where that city is located.

Honorable J. R. Fritz

Supreme Court Rule 37.12, which was promulgated in 1960, seems to conflict with the statutes. This rule reads in part as follows:

"Any warrant, other than one issued under Rule 37.48 hereof, may be directed to any peace officer of the municipality, the county or any adjoining county in this state and may be executed in any county or municipality therein by a peace officer thereof.  
\* \* \*

It appears that the rule limits the police officer of a municipality to executing a warrant only in his municipality.

The rule is settled that Supreme Court rules in conflict with statutes respecting procedural matters supercede the statutes and this would be true in this case but for the decision of the Supreme Court in Hacker vs. City of Potosi, 351 SW 2d 760.

In Hacker vs. City of Potosi, supra, decided in 1961 after the promulgation of Supreme Court Rule 37.12 the Supreme Court said this, l.c. 762.

"A policeman of a city of the fourth class is empowered by statute to serve a warrant issued by the mayor or police judge anywhere within the limits of the county. Sections 98.540 and 85.620. \* \* \*

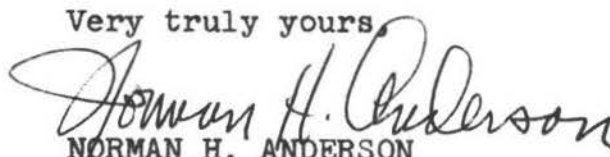
In regard to the power of policemen to execute warrants, the statutes on which Hacker vs. City of Potosi, supra, is based are in all practical effect the same as Sections 85.561 and 98.370, supra. Therefore, in view of Hacker vs. City of Potosi, supra, it is our opinion that a police officer of a third class city can make an arrest under authority of a warrant issued by such city at any place within the limits of the county within which the city is located.

#### CONCLUSION

It is the opinion of this office that a police officer of a third class city can make an arrest under authority of a warrant issued by such city at any place within the limits of the county within which the city is located.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Walter W. Nowotny, Jr.

Very truly yours,

  
NORMAN H. ANDERSON  
Attorney General

REGISTRATION OF VOTER:  
VOTER REGISTRATION:  
COUNTY CLERKS:  
CITY CLERKS:

A city clerk is not entitled to pay as deputy voter registration officer under Section 114.100, VAMS. The county clerk is required to furnish three registration cards to absentee voter.

OPINION NO. 76 (1966)  
OPINION NO. 447 (1965)

March 22, 1966

Honorable William Pannell  
Prosecuting Attorney  
Jefferson County  
Hillsboro, Missouri



Dear Mr. Pannell:

In your recent letter you requested an opinion from this office concerning voter registration in Jefferson County Missouri. One question you submitted is as follows:

"In Section 114.100 Deputy Clerks for registration (2) and (3) - compensated at the rate of \$10.00 a day for each day actually engaged in the performance of their duties. - Does this pertain to initial registration workers, or to the City Clerks.

The rate as set up by the previous Clerk was as follows, as the City Clerks take registrations on a daily basis:

City Clerk of De Soto	\$25.00 a month
City Clerk, Crystal City	25.00
City Clerk of Festus	30.00
City Clerk of Kimmswick	10.00

Is this arrangement of salary a legal charge for the County, or what provisions for payment are there, as surely, the County should not be obliged to pay at the rate of \$10.00 a day for the number of registrations taken in the cities. Should it be by actual registration - so much for each, or, since the above rates have been followed for the past years, should they remain."

Voters registration in Jefferson County is governed by Chapter 114, RSMo as amended. The above question involves an interpretation of Section 114.100, RSMo. Supp. 1965, enacted by the legislature in 1965 which reads in part as follows:

"1. The county clerk may appoint not more than two additional deputies who are in addition to those regularly employed in his office, to perform the necessary duties under this chapter, and whose salaries shall be fixed by the county court. The county clerk shall submit the names of the one or more deputies to the judge of the circuit court sitting in the county, who shall approve the appointment of the deputies before they enter upon the performance of their duties.

"2. The clerk of any city, town or village may be appointed by the county clerk as a deputy registration officer. Any clerk so appointed may accept registration of voters at their offices at any time that registration may be accepted by the county clerk, but registration shall not be accepted by these deputies at any other place.

"3. The county clerk may employ the extra deputies as are necessary, and they shall be compensated at the rate of ten dollars a day for each day actually engaged in the performance of their duties."

You inquire whether a city clerk appointed by the county clerk is to be paid at the rate of \$10.00 per day as provided under Paragraph 3, supra, and if not, how the city clerk should be compensated for his duties as deputy registration officer.

Under the above statute, a city clerk appointed under Paragraph 2, supra, is designated as "a deputy registration officer" and is required to accept registration of voters at any time that registration is accepted by the county clerk. Under Section 114.080, RSMo., a county clerk is required to accept registration of voters at all times the office is open for official business. Under Paragraph 3, supra, the deputies appointed by the county clerk under this provision are designated as "extra deputies" and they are to be compensated at the rate of \$10.00 a day for each day actually engaged in the performance of their duties. Section 114.090, RSMo. Supp. 1965, provides that the county clerk may designate additional places of registry in the county and is to place a deputy in charge.

It is elementary that the primary rule to be followed in the construction of statutes is to ascertain and give effect to the intent of the legislature. *Kasten v. Guth*, 375 S.W. 2d 110. In ascertaining the lawmakers intent, consideration is to be given to the words used and put upon the language used its

Honorable William Pannell

plain and rational meaning and to promote its object and manifest purpose of the statute. *Law Association of St. Louis v. City of St. Louis*, 294 S.W. 2d 676.

Applying these rules of construction mentioned herein it is our opinion that Paragraph 3 of Section 114.100, *supra*, is intended to apply only to extra deputies and that it does not apply to city clerks appointed as provided for under Paragraph 2 of such statute.

Since city clerks are not to be compensated as provided under Paragraph 3, the question arises as to how they are to be compensated for their extra duties as deputy registration officers.

A city clerk appointed as provided under Section 114.100, is a public officer. *Hastings v. Jasper County*, 314 Mo. 114.

It is a well settled principle of law that the right to compensation for the discharge of official duties by a public official must be provided for by statute or it does not exist, and any statute which is granted to confer such right must be strictly construed. *Felker v. Carpenter*, 340 S.W. 2d 696. This principle of law is stated in *State ex rel Forsee v. Cowan*, 284 S.W. 2d 478 1.c. 481 as follows:

"The law in Missouri is well established 'that the right of a public officer to be compensated by salary or fees for the performance of duties imposed on him by law does not rest upon any theory of contract, express or implied, but is purely a creature of the statute. *Gammon v. Lafayette County*, 76 Mo. 675; *State ex rel. Evans v. Gordon*, 245 Mo. 12, 149 S.W. 638; *Sanderson v. Pike County*, 195 Mo. 598, 93 S.W. 942; *Jackson County v. Stone*, 168 Mo. 577, 68 S.W. 926; *State ex rel. Troll v. Brown*, 146 Mo. 401, 47 S.W. 504; *Bates v. City of St. Louis*, 153 Mo. 18, 54 S.W. 439, 77 AM.St.Rep. 701; *Williams v. Chariton County*, 85 Mo. 645. \* \* \* *Maxwell v. Andrew County*, 347 Mo. 156, 146 S.W. 2d 621, 625. 'In so far as concerns compensation for services, there is a very imperfect analogy between services rendered by a public officer and those rendered by one individual to another in a private capacity. The law implies in the latter case a promise to pay as much money as the services are reasonably worth, whereas the compensation for services of a public



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officer is in most cases fixed by positive law. If the fixed compensation is more than the service is worth, the public or party must pay it; if less, the officer must be content with it." 43 Am. Jur., sec. 362, p. 150.' Alexander v. Stoddard County, Mo. Sup., 210 S.W. 2d 107, 109. See also State ex rel. Harrison v. Patterson, 152 Mo.App. 264, 132 S.W. 1183."

\* \* \* \* \*

"Now, the law is also clear that '[e]ven in the absence of statutory prohibition and even though the work or services consist of "extra services," if they are in point of fact a part of or germane to the official duties of his office, the officer's employment, for obvious reasons, is against public policy and he is not entitled to compensation for performing the services. Annotations 84 A.L.R. 936; 159 A.L.R. 606.' Polk Tp., Sullivan County v. Spencer, Mo. Sup., 259 S.W. 2d 804, 805. See also Tyrell v. Mayor, etc., of City of New York, 159 N.Y. 239, 53 N.E. 1111, 1112; 43 Am. Jur., 'Public Officers', § 363, p. 151."

We have been unable to find any statutory provision allowing a city clerk to be compensated from public funds for his services as a deputy registration officer.

We believe these cases are authority for holding that a city clerk appointed as a deputy registration officer under Section 114.100, supra, is a public officer, that his services as a deputy registration officer are official duties placed on him by law and since there is no statutory provision for compensation to be paid by the county for such services, he is not entitled to be compensated for such services from county funds.

Another question you submit as follows:

"Regarding Section 114.060 - absentee or disability registration, our system now only entitles a person to vote an absentee ballot, as the triplicate registrations are not forwarded to the applicant, therefore their would be no



signature for an election judge to examine if he were to walk into a regular polling place.

However, Section 114.060 states \*\*\* shall on application state facts as to illness, disability or absence, the completed form (which we take would mean the application) shall be sworn to. \*\*Upon filing the completed form, the applicant shall be deemed duly registered. However, if the actual triplicate registration form is not furnished to the applicant, and his signature placed thereon how can he be duly registered? By this, then, would it be permissible to mail the triplicate form to an absent or ill voter for his signature. If mailing is permissible, is it to apply strictly to absent or ill voters, or is it legal for the Clerk or Deputy to carry registration cards for ill persons."

Section 114.060, RSMo provides:

"Any person, who through illness, disability, or absence from the county, expects to be prevented from appearing at the place of registry or at the county clerk's office within the time for registration prior to a primary or general election shall on application, stating the facts as to his illness, disability, or absence from the county be provided with a form by the county clerk, to be filled in by the applicant, showing all data necessary for the registration records. The completed form shall be sworn to by the applicant before an officer authorized to administer oaths and shall be returned by mail or otherwise to the county clerk at least thirty days before any primary or general election. Upon filing the completed form as herein required, if in proper form, the applicant shall be deemed duly registered."

Under this section a voter who expects to be unable to register because of illness, disability or absence from the county is required to make a written application to the county clerk stating the facts as to his illness, disability or absence from the county. This application is not required to be under oath. It further provides that upon receipt of this application the county clerk is required to furnish the applicant with the proper registration forms to be filled in by the applicant showing the information necessary for registration.

Section 114.130, RSMo, provides for the procedure to be

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followed when an elector offers to register. It requires the county clerk to provide the elector with three registration cards, one tinted pink, one blue, and one white. It further requires that these cards contain certain information as set out in the statute. It further provides the form of affidavit which must be signed and sworn to by the elector.

It is our opinion that when an elector who through illness, disability or absence from the county desires to register, the county clerk is required to furnish the elector with three registration cards in the form as required by Section 114.130, RSMo. These cards must be completed, signed and sworn to by said elector before an officer authorized to administer oaths and returned by mail or otherwise to said clerk at least 30 days before the election.

On February 24, 1966, we forwarded several opinions that have been issued by this office which we believe answered the other questions you submitted.


#### CONCLUSION

It is our opinion that:

1. Paragraph (3) of Section 114.100, RSMo Cum. Supp. 1965, does not apply to a city clerk appointed under Paragraph (2) of said section.
2. A city clerk appointed as a deputy registration officer under Paragraph (2) of Section 114.100, RSMo Cum. Supp. 1965, is not entitled to compensation from the county for his services as a deputy registration officer.
3. The county clerk is required to furnish an elector who expects to be unable to register because of illness, or absence from the county at the time of registration, with three registration cards in the form provided under Section 114.130, RSMo which cards are to be filled out, sworn to and returned by mail or otherwise to the county clerk at least 30 days before the election.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Moody Mansur.

Very truly yours,

  
NORMAN H. ANDERSON  
Attorney General

COURTS:  
MAGISTRATE COURTS:  
CIRCUIT COURTS:  
CRIMINAL LAW:  
MISDEMEANORS:  
JURISDICTION:  
TRAFFIC REGULATION:

The Prosecuting Attorney **may** at his discretion file misdemeanor charges for traffic offenses in the circuit court, and may file a traffic ticket as the information, provided the traffic ticket complies with the requirements of law for informations.

OPINION NO. 78 (1966)  
OPINION NO. 449 (1965)

May 4, 1966

Honorable Sharon J. Pate  
Prosecuting Attorney  
Pemiscot County  
Caruthersville, Missouri



Dear Mr. Pate:

You have requested an official opinion of this office concerning the authority of a prosecuting attorney in a third class county to prosecute traffic violations that are misdemeanors in the circuit court, and, if so, whether he may file traffic tickets to serve as informations in the circuit court. The traffic regulations of the state are set forth in Chapter 304 of the Revised Statutes of Missouri. This chapter provides that violations of the various traffic regulations shall be misdemeanors.

Section 541.020 provides as follows:

"Except as otherwise provided by law, the circuit courts shall have exclusive original jurisdiction in all cases of felony, and concurrent original jurisdiction with and appellate jurisdiction from magistrates and police courts of towns and cities in all cases of misdemeanor."

Reported decisions of the Missouri courts hold that misdemeanor prosecutions are properly brought in the circuit court. State vs. Cartee, 48 Mo. 481; State vs. Alsup, Mo. App. 123 S.W. 1011; State vs. Saxauer, 48 Mo. 454; Clay vs. State, 6 Mo. 600, State vs. Bradley 31 Mo. App. 308.

In harmony with the above authorities, misdemeanor prosecutions may be brought either in the magistrate court or in the circuit court Supreme Court Rules 37.46 to 37.50, governing traffic cases in municipal courts, magistrate courts and the St. Louis Court of Criminal Correction, contain nothing restrictive of the jurisdiction of circuit courts in traffic cases.

Honorable Sharon J. Pate

The prosecuting attorney, whose duty it is to prosecute for crimes in his county, may file informations in case of traffic violations as well as in other misdemeanor cases in the circuit court or the magistrate court, in his discretion.

The question remains whether the Uniform Traffic Ticket will serve as an information in the circuit court. The same standards would have to be met in magistrate court informations as are met in circuit court informations since the magistrate court is a court of record, Section 476.010 and Section 517.050 RSMo. The Supreme Court of Missouri has in effect by promulgation of its rules held that the Uniform Traffic Ticket although not in the usual form of informations is as a matter of law sufficient in any court of record since the Supreme Court is presumed to follow the law in promulgating its rules, and to have been aware that the magistrate court is a court of record.

All that is necessary in a circuit court information is that it state the essential facts which allegedly constitute the offense so that defendant will be informed with reasonable certainty whereof he is charged, so that admissibility of evidence can be determined, and so that, when the case is decided it will bar another prosecution for the same offense. State vs. Graham, Mo. App. 322 S.W. 2d 188. It should consist of a plain, concise and definite written statement of the essential facts constituting the offense charged. Article 1, Section 18 (a) Missouri Constitution 1945, Supreme Court Rules 24.01, 24.11. Mere conclusions of law are insufficient. State vs. McCloud, Mo. App. 313 S.W. 2d 177.

The Uniform Traffic Ticket set out in suggested form 37.1162 of the Supreme Court Rules, when the applicable blank spaces therein are filled in with the facts obviously called for and necessarily required, sufficiently passes the test set out in the cited cases, statutes and rules with respect to all traffic violations except violations of such rules of the road set out in Chapter 304 RSMo that are not included in the printed part of the Uniform Traffic Ticket, leaving the scene of an accident, and driving under the influence of liquor or drugs. Allegations with respect to these latter offenses should be set out with particularity in the blank space provided in the ticket under "other violations".

We enclose a copy of a letter issued by this office, addressed to Honorable Lawrence F. Gepford, pointing out the necessity of definiteness and particularity in filling out the Uniform Traffic Ticket. We think it is the safer course to file the usual information in circuit court, rather than using the traffic ticket in place of such information.

Honorable Sharon J. Pate

CONCLUSION

It is the opinion of this department that the prosecuting attorney may at his discretion file misdemeanor charges for traffic offenses in the circuit court, and may file a traffic ticket as the information, provided the traffic ticket complies with the requirements of law for informations.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Donald L. Randolph.

Yours very truly,

A handwritten signature in black ink, appearing to read "Norman H. Anderson", written in a cursive style.

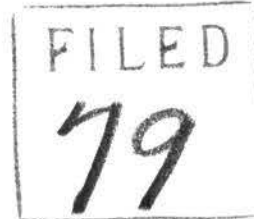
NORMAN H. ANDERSON  
Attorney General

NON-TEACHER RETIREMENT: Employees of the junior college districts  
SCHOOLS: are not members of the Non-Teacher School  
JUNIOR COLLEGES: Employee Retirement System (Sections  
169.600 - 169.710, RSMo. Supp. 1965).

OPINION NO. 79 (1966)  
Opinion No. 450 (1965)

March 17, 1966

Mr. Geo. L. Donahoe,  
Executive Secretary  
Public School Retirement System  
Farm Bureau Building  
Jefferson City, Missouri



Dear Mr. Donahoe:

This opinion is issued in response to your request for an official ruling:

You inquire:

"Are the employees of junior college districts organized under the provisions of Sections 178.770 to 178.890 [RSMo. Supp. 1965], to be considered as 'employees' in accordance with the definition of this term in House Bill 88?"

House Bill 88 of the 73rd General Assembly has been designated Sections 169.600 to 169.710, RSMo. Supp. 1965.

Section 169.600(4), defines "employee" as:

"'Employee', any person regularly employed by a public school district, as defined in sections 169.600 to 169.710, who devotes at least twenty hours per week to such employment in a position which is not covered by the public school retirement system of Missouri; provided, however, that no person shall be entitled to, or required to contribute to, or to receive benefits under both the public school retirement system of Missouri for the same services; \* \* \*

Section 169.600(10) defines "public school district" as"

"'Public school district' or 'district', any duly constituted public school district under the authority and supervision of a duly elected district or city or town board of directors or board of education, except those school districts defined in sections 169.270 and 169.410; \* \* \*



Mr. Geo. L. Donahoe

Section 160.011, RSMo. Supp. 1965, defines "public school" and "school district" as follows:

"(3). 'District' or 'school district', when used alone, may include common, six-director, urban, and metropolitan school districts;

"(9). 'Public school' includes all elementary and high schools operated at public expense;\* \* \*"

These definitions of Section 160.011, are not expressly applicable to Chapter 169, however they do apply to the general school laws and give some insight of how junior college districts have been classified by the legislature. Section 160.011 does not include junior college districts within the meaning of "public school district." They are in a separate class of their own.

Section 169.600(10) defines a "Public school district" as one under the supervision of a "board of directors or board of education." Junior college districts are governed by a "board of trustees." Section 178.820, RSMo. Supp. 1965.

Upon reading Section 169.600(4), one is inclined to think of the Non-Teacher School Employee Retirement System as complementary to the State Public School Retirement System (Sections 169.010 - 169.130, RSMo 1959). However, a close comparison reveals this not to be wholly accurate.

The teacher retirement system includes teachers in public elementary and secondary schools. Comparably, the non-teacher system includes non-teachers in such schools. However, there the similarity ends. The teacher's system includes certificated personnel of state colleges. The non-teacher system, however, does not include employees of the state colleges.

We note that Section 178.770, RSMo. Supp. 1965, provides that junior college districts shall "possess the same corporate powers as common and six-director school districts in this state, other than urban districts. . . ." However, we are not of the opinion that this reference brings employees of the junior college districts into the non-teacher system. Section 178.770 deals with the rights and duties of the districts. Membership in the non-teacher system is a question of rights and duties of persons.

Certificated employees of junior college districts did not become members of the teacher retirement by terms of the retirement statutes, but by special provisions in the Junior College District Law. Section 178.860, RSMo. Supp. 1965.

Mr. Geo. L. Donahoe

Since the legislature used express provisions to include certificated employees of junior college districts in the teacher retirement system, the absences of such express provision for non-teacher employees indicates an intent not to include them in the non-teacher retirement system.


Based upon the foregoing statutory provisions, we are of the opinion that the legislature did not intend to include the non-teaching employees of junior college districts as members of the Non-Teacher School Employee Retirement System.

#### CONCLUSION

Therefore, it is the opinion of this office that employees of junior college districts (Section 178.770 - 178.890, RSMo. Supp. 1965, are not "employees" within the meaning of Section 169.600(4), RSMo. Supp. 1965, and that junior college districts are not districts within the meaning of Section 169.600(10). Hence, employees of the junior college districts are not members of the Non-Teacher School Employee Retirement System (Sections 169.600 - 169.710, RSMo. Supp. 1965.

The foregoing opinion which I hereby approve was prepared by my assistant, Louis C. DeFeo, Jr.

Yours very truly,

  
NORMAN H. ANDERSON  
Attorney General

INSURANCE: CORPORATE NAME Foreign insurance company cannot be authorized  
CORPORATIONS: NAME to do business under name same as or similar  
to existing domestic or foreign insurance  
company.

Opinion No. 81 (1966)

April 8, 1966

Honorable Robert D. Scharz  
Superintendent  
Division of Insurance  
Jefferson Building  
Jefferson City, Missouri



Dear Mr. Scharz:

Reference is made to your request for a formal opinion from  
this office stated as follows:

"This is to respectfully request your opinion as  
to whether or not the Missouri Superintendent of  
Insurance may refuse to license a foreign insur-  
ance company to do business in Missouri when the  
name of such company is the same, or deceptively  
similar, to a name of a domestic insurance com-  
pany or other foreign insurance company licensed  
to do business in Missouri. We would like your  
opinion to encompass all types of insurance com-  
panies that come under the jurisdiction of the  
Division of Insurance."

The duties of the Superintendent of Insurance are set forth  
generally in Section 374.040, RSMo 1959. (All references to the  
statutes hereinafter shall be to the Missouri Revised Statutes,  
1959, as amended.) Section 374.040 provides in part as follows:

"It shall be the duty of the superintendent of the  
insurance division \* \* \* to issue certificates of  
authority to transact insurance business in this  
state to any companies who have fully complied with  
the laws of this state, \* \* \* ."

Section 375.010 provides in part as follows:

"No company shall transact in this state any insur-  
ance business unless it shall first procure from the  
superintendent of the insurance division of this  
state a certificate stating the requirements of the  
insurance laws of this state have been complied with  
authorizing it to do business, \* \* \* ."



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The general statutory provisions for life and accident insurance companies are set forth in Chapter 376. Section 376.030 provides as follows:

"No corporation formed under the laws of this state, concerning life assurance, shall adopt the name of any existing company or association transacting the business mentioned in section 376.010, nor any name so similar thereto as to be calculated to mislead the public."

Specific requirements of foreign insurance companies to transact life and accident insurance business in this state are set forth in Sections 376.420 through 376.470. These provisions are silent as to the use of a name the same as, or deceptively similar to, a name of a domestic insurance company or other foreign insurance company licensed to do business in Missouri.

Sections 376.680 through 376.760 relate to industrial and prudential insurance. Section 376.710 (1) provides that any such corporation shall not have the name of another corporation formed for similar purposes or any imitation of such name.

Sections 377.010 through 377.190 relate to assessment plan life insurance. Section 377.020 (3) provides in part as follows:

" \* \* \* provided, that \* \* \* no certificate of incorporation (shall be) issued as aforesaid until the superintendent of the insurance division shall certify that the proposed name of the corporation is not the same and does not resemble the name of any other corporations authorized to do business in this state, to the extent of misleading the public, \* \* \* ."

Sections 377.130 through 377.160 specify requirements for foreign companies to engage in the assessment plan life insurance business in this state. These statutory provisions are silent in regard to the use of a name the same as or resembling the name of other corporations authorized to engage in similar business in this state.

Sections 377.199 through 377.460 relate to stipulated premium plan life insurance. Section 377.220 provides that the articles of agreement of such companies shall set forth:

"1. (1) The corporate name of the proposed corporation, which shall not be the name of any corporation heretofore incorporated or doing business in this state for similar purposes, or any such imitation of such name calculated to mislead the public; \* \* \* "

Honorable Robert D. Scharz

Sections 377.410 through 377.430 set forth requirements for foreign companies to engage in the stipulated premium plan life insurance business in this state. These statutes are silent as to the use of a corporate name the same as or similar to other corporations doing a similar business in this state.

The statutory provisions in regard to insurance other than life are set forth in Chapter 379. Section 379.025 provides in part as follows:

" \* \* \* no such corporation shall adopt the name of any existing company or corporation transacting the same kind of business, or a name so similar as to be calculated to mislead the public; \* \* \* "

Sections 379.110 through 379.135 are specific statutory requirements for foreign companies to engage in the business of insurance other than life in this state. The statutes are silent as to the use of a name by a foreign company which is the same as or similar to the name of another company engaged in the same business.

Sections 379.205 through 379.310 relate to mutual insurance companies other than life or fire insurance. Section 379.215 provides as follows:

"No name shall be adopted by such company which does not contain the word 'mutual' or which is so similar to any name already in use by any such existing corporation, company or association, organized or doing business in the United States, as to be confusing or misleading."

Section 379.280 sets forth the general requirements for foreign companies to transact the business of insurance other than life or fire insurance on the mutual plan in this state. Section 379.280 (6) provides as follows:

"(6) Its name shall not be so similar to any name already in use by any such existing corporation, company or association organized or licensed in this state as to be confusing or misleading."

Thus, the statutes in regard to the transaction of insurance business in the State of Missouri are divided into six categories classified according to the type of insurance business to be transacted. Each of these categories prohibits domestic companies from using the same name, or a similar name, as any other company. The statutes manifest a clear intention to prevent the use of names by more than one company which might mislead the public. The use of the same or a similar name by two or more companies would tend to mislead and deceive the public.



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However, with the exception of mutual companies other than life and fire, the statutes are silent in regard to the use of the same or similar name by foreign insurance companies authorized to do business in this state. Therefore, the significance, if any, of this omission must be considered.

The State of Missouri has consistently followed a liberal public policy in regard to the transaction of business in this state by foreign corporations. The Supreme Court commented upon this policy in *State ex rel Standard Tank Car Co. vs. Sullivan*, 221 SW 728, by quoting with approval *State ex rel vs. Cook*, 181 Mo. 596, 80 SW 929, as follows (221 SW, 1c 734):

"Looking to our statutory provisions for the public policy of the state, it will be readily observed that we have adopted a most liberal comity toward corporations organized under the laws of other states and countries. Indeed, we have placed them upon substantially the same footing as our own domestic corporate bodies and given them the same powers and subjected them to the same obligations that are provided for like corporations in this state, \* \* \*" (Emphasis Added)

The court further referred to the indices of public policy as follows (1.c. 737):

"[10,11] The sources of evidence of what the policy of this state as to foreign companies is are these: The enacted laws of the state; the decisions of its courts of review; the practice of the executive department of the government; and, presumably, the purpose to preserve bonos mores by keeping out everything tending toward fraud. 8 Fletcher, §5736, p. 9376, quoting *Clark v. Railroad*, 123 Tenn. 232, 130 S.W. 751. See, also, *St. Louis Min. and Mil. Co. v. Montana Min. Co.*, 171 U.S. 655, 19 Sup. Ct. 61, 43 L. Ed. 320, and other cases cited in note 56, p. 9402. \* \* \*"

It appears that the use of a name by a corporation does not depend upon the statutes alone. In *State ex rel Great American Home Sav. Institution vs. Lee*, 233 SW 20, 1.c. 28, the court stated as follows:



Honorable Robert D. Scharz

"[11] The name of a corporation or of an unincorporated association is a necessary element of its existence, and the right to its exclusive use will be protected upon the same principle that persons are protected in the use of trade-marks. State ex rel. v. McGrath, 92 Mo. 355, loc. cit. 357, 5 S.W. 29; 5 C.J. 1343 (31). \* \* \* "

Upon the question of the use of names similar to existing corporations by foreign corporations, 20 C.J.S., Corporations, Section 1887, p. 110, states as follows:

"As a general rule, registration of a foreign corporation, or the issuance to it of a license or permit to do business within the state, may and should be refused where its corporate name is the same as, or closely similar to, that of an existing domestic corporation or of another foreign corporation already registered in the state. \* \* \* "

As to the use of similar names generally by corporations, see 18 C.J.S., Corporations, Section 167, p. 562 et seq.

Section 375.010 requires all companies transacting insurance business in this state to procure a certificate of authority from the superintendent of the insurance division. The cited section together with Section 374.040 requires all companies engaged in the insurance business in this state to fully comply with the laws of this state in regard to the organization of insurance companies. These sections apply to foreign insurance companies with equal force as to domestic companies. Sections 376.030, 376.710, 377.020, 377.220, 379.025, and 379.215 prohibit the organization of insurance companies under a name the same as or similar to existing insurance companies. These statutory provisions are included among the provisions referred to in Sections 374.040 and 375.010, which must be fully complied with before a certificate of authority may issue to a foreign corporation as well as to a domestic corporation.

Although the courts of the State of Missouri have not ruled upon this question, a substantially similar question arose before the Court of Civil Appeals of Texas in Board of Insurance Com'rs. v. National Aid Life, 73 SW 2d 571. In ruling upon this question the court stated as follows (l.c. 672):

Honorable Robert D. Scharz

"[1,2] Article 4700 vests in the Board of Insurance Commissioners, whose duty it is to issue permits to both foreign and domestic life insurance corporations to carry on such business in this state, the power to refuse a permit where the name of the subsequent domestic corporation is 'so similar to that of any other insurance company as to be likely to mislead the public.' This statute merely adopts the universal rule that equity will protect a corporation in the use of a name selected and used by it, which rule likewise applies where a subsequent corporation attempts to use a similar name to that of an existing corporation. Thompson on Corporations (3d Ed.) vol. 1, pp. 85-87, §77; Holloway v. Memphis, etc. R. Co., 23 Tex. 465, 76 Am. Dec. 68. The statutes of many states expressly adopt the rule, and it has been held, even where no such express statutory provision exists, the court, officer, or administrative or ministerial board whose duty it is to grant or refuse charters, or articles of incorporation, or certificates of authority, or permits to transact or carry on business within a state, will not permit the use by any subsequent corporation of a name similar to or so nearly like that of another corporation as would be likely to produce mistake or confusion. Philadelphia Trust, etc., Co. v. Philadelphia Trust Co. (C. C.) 123 F. 534; Thompson on Corporations (3d Ed.) vol. 1, p. 80, and cases there cited.

[3] This rule would authorize the Board of Insurance Commissioners whose regulatory power over the insurance business is broad and plenary, and whose duty it is to issue certificates of authority or permits to transact business in the state to both foreign and domestic insurance corporations, to refuse a permit to a foreign insurance corporation where its name is 'so similar to that of any other insurance company as to be likely to mislead the public.' But aside from this conclusion, it is without question the duty of the Board under the provisions of article 4700 to refuse a permit to a subsequent domestic life insurance corporation to do business in this state if its name is so similar to that of an existing corporation as to likely mislead the public dealing with the two corporations; and article 5068 makes 'the provisions of this title (title 78 of which article 4700 is a part) conditions upon which foreign insurance corporations shall be permitted to do business within this State.' It is true that article 4700 specifically relates to the incorporation of domestic insurance corporations; but this court held in the recent case of



Honorable Robert D. Scharz

Fire Protection Co. of America v. State (Tex. Civ. App.) 59 S.W.(2d) 888, that article 5068, made the provisions of title 78, which included article 4700, applicable to a foreign insurance corporation doing business in this state. To hold, as contended for by appellee, that the principle forbidding similarity of name had no application, or could not be invoked against a foreign insurance corporation seeking a permit to do business in Texas, would not only give such foreign insurance corporation a great advantage over a domestic corporation of the same or a similar name, or a foreign corporation already transacting a business under a permit issued by the Board; but the necessary consequence of the subsequent foreign corporation taking the name of an existing corporation under the laws, whether a domestic or a foreign corporation with permits to do business in the state, would be to confuse or mislead the public dealing with such corporation. No good reason could exist as to why the Legislature would prohibit domestic insurance corporations from adopting similar names, and at the same time grant a permit to a foreign insurance company with a similar name to an existing insurance company. Manifestly the Legislature intended by the enactment of article 5068 to require all foreign insurance corporations to comply with all provisions and regulations required of domestic insurance corporations. Such being our conclusion, we pass to a consideration of whether the Board has abused its discretionary power in concluding that the name 'National Aid Life' is so similar to 'National Aid Life Association' as to be likely to mislead the public dealing with the two corporations.

It may be remarked that since the statute against similarity of names has merely adopted the equity rule aforementioned, cases construing such rule necessarily control."

The facts before the court were substantially the same as the facts being considered in this opinion and the provisions of the Texas statutes were similar to our Missouri statutes. This office considers the opinion to be well-reasoned, based upon sound legal principles, and fully applicable to the question under consideration.

We have been cited to the case of People ex rel Traders Ins. Co. v. Van Cleave, 183 Ill. 330, 55 NE 698. We believe that the Texas case is the better reasoned authority under the applicable facts.


Honorable Robert D. Scharz

CONCLUSION

The Superintendent of the Division of Insurance may refuse to issue a certificate of authority to transact insurance business in this state to a foreign insurance company if the name of such company is the same as, or deceptively similar to, the name of a domestic insurance company or foreign insurance company authorized to do business in Missouri.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Thomas J. Downey.

Very truly yours,



NORMAN H. ANDERSON  
Attorney General

DRIVERS LICENSE: The only appeal from the revocation of a  
DRIVERS LICENSE REVOCATION: person's drivers license pursuant to  
DRIVING WHILE INTOXICATED: Section 564.444, RSMo Cum. Supp., for  
MOTOR VEHICLES: refusing to submit to the chemical  
breath test provided therein, is as  
provided by paragraph 2 of that section.

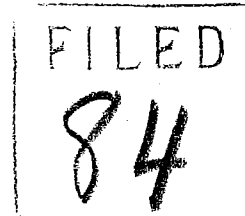
In such appeal the burden is upon the state, acting through the local prosecuting attorney, to show by a preponderance of the evidence that: (1) The person was arrested; (2) The arresting officer had reasonable grounds to believe that the person was driving a motor vehicle while in an intoxicated condition; and (3) The person refused to submit to the test.

If that burden of proof is sustained by the state, then the court should affirm the order of the Director of Revenue.

October 27, 1966

OPINION NO. 84 (1966)  
456 (1965)

Honorable Thomas A. David, Director  
Department of Revenue  
Jefferson Building  
Jefferson City, Missouri



Dear Mr. David:

This is in answer to your request for an opinion of this office as to the procedure and scope of judicial review of an order of the Department of Revenue suspending or revoking a driver's license under Section 564.444, RSMo Supp. 1965, because of his refusal to submit to a chemical breath test.

The scope of judicial review of an order of revocation under this section is stated specifically in paragraph 2 thereof as follows:

"If a person's license has been revoked because of his refusal to submit to a chemical test, he may request a hearing before a court of record in the county in which he resides or in the county in which the arrest occurred. Upon his request the clerk of the court shall notify the prosecuting attorney of the county and the prosecutor shall appear at the hearing on behalf of the arresting officer. At the hearing the judge shall determine only:

- (1) Whether or not the person was arrested;
- (2) Whether or not the arresting officer had reasonable grounds to believe

Honorable Thomas A. David, Director

that the person was driving a motor vehicle while in an intoxicated condition; and,

(3) Whether or not the person refused to submit to the test."

In your letter you ask whether or not courts have jurisdiction other than that provided by this paragraph to accept appeals and grant relief in the case of revocations resulting from the refusal to submit to the chemical test.

The answer to this question is no. A petition for review under the provisions of Chapter 536, RSMo, the Administrative Procedure Act, would not be proper inasmuch as the decision of the Director of Revenue to revoke the license did not result from a "contested case" as that term is used therein.

You raised the question of the applicability of Section 302.309 and 564.440. Review does not lie under the provisions either of Section 302.309, RSMo Cum. Supp. or 564.440, RSMo Cum. Supp. These sections pertain only to the granting of "hardship" or "limited" driving privileges.

The only procedure for review of the revocation of a person's drivers license under Section 564.444 is by direct appeal as provided by paragraph 2 thereof.

While the scope of review is provided by Section 564.444-2, the proper pleading required to institute such review is not specifically provided.

You state that your office has received petitions for review which require the Director of Revenue to "show cause" why his order of revocation should not be rendered null and void or in the alternative, a request for the granting of limited driving privileges.

In our opinion whatever the method of pleading may be, the state has the burden to show by a preponderance of evidence that the questions to be determined must be answered in the affirmative.

This burden is placed upon the state because the revocation of a driver's license for refusal to take a chemical breath test (or for any other reason) is an affirmative action by the state which must be justified under the enabling statute. To justify a valid revocation under Section 564.444, the state must show the person was arrested, that the officer had reasonable grounds to believe the person was driving a motor vehicle while intoxicated and that the person refused to submit to the test.

In most cases when a person's drivers license has been revoked, the facts necessary to authorize the revocation have been established



Honorable Thomas A. David, Director

by a hearing before either a judicial or administrative body prior to the hearing on review. In such cases the court on review decides only if the evidence supports the finding of the hearing body.

But when a person's license has been revoked for failure to take a chemical breath test, the necessary facts have not been judicially passed upon. It is at the hearing on review that for the first time the facts which the state must show to justify the revocation are subject to judicial scrutiny. The burden of the state to establish these facts may be required by a request for a "show-cause" order or by any other proper pleading. If the state, acting through the proper prosecuting attorney, does not sustain this burden, the court would be correct in enjoining or otherwise preventing the Director of Revenue from enforcing his order of revocation.

The hearing on review may be initiated by a simple petition for review, a request for a "show-cause" order or by other proper pleading. However, whatever the form of pleading, the Department of Revenue should immediately contact the proper prosecuting attorney and request him to appear at the hearing and by use of the testimony of the arresting officer and such other pertinent evidence as may be available, represent the state's position. If any new or novel question is presented, the Attorney General should be notified.

#### CONCLUSION

The only appeal from the revocation of a person's drivers license pursuant to Section 564.444, RSMo Cum. Supp., for refusing to submit to the chemical breath test provided therein, is as provided by paragraph 2 of that section.

In such an appeal the burden is upon the state, acting through the local prosecuting attorney, to show by a preponderance of the evidence that:

- (1) The person was arrested;
- (2) The arresting officer had reasonable grounds to believe that the person was driving a motor vehicle while in an intoxicated condition; and

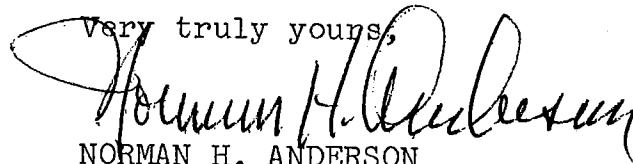
Honorable Thomas A. David, Director

(3) The person refused to submit to the test.

If that burden of proof is sustained by the state, then the court should affirm the order of the Director of Revenue.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John H. Denman

Very truly yours,

A handwritten signature in cursive script, appearing to read "Norman H. Anderson". The signature is written in dark ink and is positioned above the printed name.

NORMAN H. ANDERSON  
Attorney General

HOSPITAL DISTRICTS:  
POLITICAL SUBDIVISION:  
FINANCIAL REPORTS:

A county hospital organized pursuant to Section 205.160 and related sections is a political subdivision of this state insofar as Section 105.145 RSMo Supp. 1965 is concerned and must cause to be prepared and filed an annual financial report pursuant to Section 105.145, RSMo. Cum. Supp. 1965.

September 22, 1966

Honorable Paul D. Hess, Jr.  
Prosecuting Attorney of Macon County  
Macon, Missouri

OPINION NO. 85 (1966)  
OPINION NO. 457 (1965)



Dear Mr. Hess:

This is in response to your request for an official opinion of this office which reads in part as follows:

"The Macon County (American) Memorial Hospital is a county hospital duly organized and functioning under the provisions of Section 205.160 RSMo. 1959, and relative sections. Under Section 205.200 the hospital Board of Trustees has a certain discretion relative to annual tax levy, although such is handled through the Macon County Court.

"Please advise me, whether or not this county hospital must comply, when timely, with the provisions of recently adopted Section 105.145, or does this county hospital fall within the scope of the exception therein specified in Sub Section 1-(1) where counties and school districts are excepted?"

Essentially the question is whether or not a county hospital is a separate political subdivision from the county insofar as compliance with Section 105.145 RSMo. Supp. 1965, is concerned which Section requires all political subdivisions to cause to be prepared and filed an annual report of the financial transactions of the political subdivision.

Paragraph 1 of Section 105.145 RSMo. Cum. Supp. 1965, provides the following definition which shall be applied to the terms used in this Section:

"(1) 'Political subdivision,' any agency or unit of this state, except counties and school districts, which now is, or hereafter shall be, authorized to levy taxes or empowered to cause taxes to be levied:"

It is clear a county hospital causes taxes to be levied. Section 205.200 RSMo. Cum. Supp. 1965 specifies the county court shall levy annually a rate of taxation for the benefit of the hospital as certified to it by the Board of Trustees of the hospital.

Honorable Paul D. Hess, Jr.

The county court serves merely as a conduit through which taxes flow with respect to the county hospital, and through which the financial needs of the hospital are met. It is mandatory that the court levy taxes, under Section 205.200, Cum. Supp. 1965, when such levy is certified by the county court.

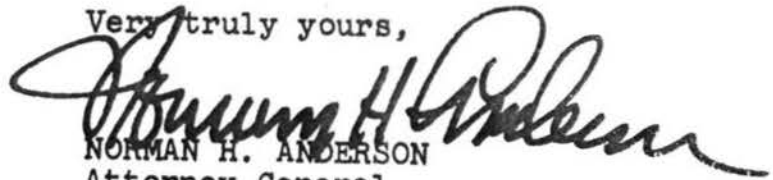
In view of the foregoing discussion, it is clear that a county hospital is a unit of this state which is empowered to cause taxes to be levied.

#### CONCLUSION

It is the opinion of this office that a county hospital organized pursuant to Section 205.160 and related sections, is a political subdivision of this state insofar as Section 105.145 RSMo Supp. 1965, is concerned and must cause to be prepared and filed an annual financial report pursuant to Section 105.145, RSMo. Cum. Supp. 1965.

This opinion which I hereby approve was prepared by my assistant Mr. Jerome Wallach.

Very truly yours,



NORMAN H. ANDERSON  
Attorney General

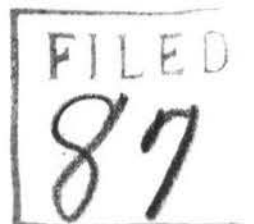
LOBBYIST:  
LOBBYING:  
LEGISLATION:

The representative of Christian Scientists who attempts to influence legislation is regulated by Section 105.470 RSMo Cum. Supp. 1965.

March 17, 1966

OPINION NO. 87 (1966)  
" " 459 (1965)

Honorable John H. Wolfe  
Presiding Judge  
St. Louis Court of Appeals  
Civil Courts Building  
St. Louis, Missouri



Dear Judge Wolfe:

This is in response to your November 29, 1965, request for an opinion from this office concerning the status of the Christian Science Committee on Publication which reads in part as follows:

"House Bill # 422 passed by the last Legislature, now Section 105.450 to 105.495, relating to conflict of interest and lobbying, is written in rather broad terms and Mr. Elgin Wasson who is the present committee of one in Missouri asked me \* \* \* whether or not he is obliged to register under the act. \* \* \*"

It is our understanding that the Christian Science Committee on Publication, hereafter called the Committee, performs a variety of functions primarily in the field of public relations. These activities include contact with the public through radio, newspaper, and printed information brochures. Among the duties of the Committee is the activity of contacting various members of the legislature for the purpose of guaranteeing against legislation inimical to the Christian Scientist's belief in spiritual means of healing.

While the statute in question seeks to regulate activities of persons commonly referred to as "lobbyists", it offers no definition of the term. However, Section 105.470 RSMo Cum. Supp. 1965, describes the persons it was intended to cover:



Honorable John H. Wolfe

"Any person who engages himself for pay or for any valuable consideration for the purpose of attempting to influence the passage or defeat of any legislation by the general assembly of Missouri or who expends money for such purposes shall \* \* \*"

We have sought assistance in our endeavor to interpret this statute by studying the Federal Lobbying Act (2 USCA Sec. 266 & 267) and have studied the federal decisions interpreting it but because of material differences in the two acts we find the federal law of little or no assistance.

While the revisor of statutes has for convenience in the heading of Section 105.470, RSMo Cum. Supp. 1965, referred to "Lobbyists", yet the word is not used in the body of the statute. We could and have assembled numerous definitions of "lobby" and "lobbyist", however that seems not helpful because, as mentioned, the word is not used in the statute although clearly the statute is intended to regulate the activity commonly known as lobbying.

We therefore turn to language used "Any person who engages himself for pay \* \* \* for the purpose of attempting to influence the passage or defeat of any legislation \* \* \* or who expends money for such purposes shall \* \* \*" This appears to be the most comprehensive language possible. Only one exception is mentioned in the statute, " \* \* \* No state officer, or member of the general assembly shall be required to register under this section because of his lawful attempts to influence the passage or defeat of legislation solely in the course of his official duties. \* \* \*"

Any person other than those persons specifically excluded, meeting the two requirements of (1) engaging himself for pay or valuable consideration and (2) who attempts to influence the passage or defeat of any legislation by the General Assembly, comes within the purview of the statute, as well as those persons meeting the separate criterion of expending money for the purpose of influencing legislation.

The instant situation is that of a representative of the Christian Scientists whose general duties have no reference to legislative matters but may from time to time either go to Jefferson City or take other action to oppose, support, or alter a specific bill which may affect the interest of Christian Scientists. He speaks or writes or otherwise communicates with legislators, testifies, if necessary, before committees and exerts whatever persuasion he can to prevent or promote legislation of interest or concern to Christian Scientists. Immediately after the bill has been altered, passed or defeated he returns to his usual duties.



Honorable John H. Wolfe


The committee, consisting of one man, might argue that he was not employed to influence legislation and that this is not his principal activity. Under the present Missouri statutes the argument that his legislative activities are merely incidental to his primary activities is without merit. We assume that part of his duties are legislative in nature and thus part of his compensation is derived for such activities. He is acting in his official capacity and not as an individual since it is the interest of Christian Science which is affected by the pending legislation. Although over a long period of time his principal activity may be with other Christian Science affairs nevertheless if he attempts to influence legislation or expends money attempting to influence legislation it falls within the orbit and regulation of the statute.

#### CONCLUSION

It is the conclusion of this office that the Christian Scientist Committee on Publication or its representative which attempts to influence the passage or defeat of legislation in the general assembly of Missouri or expends money for that purpose is regulated by the provisions of Section 105.470, RSMo Cum. Supp. 1965.

The foregoing opinion which I hereby approve was prepared by my assistant, J. Gordon Siddens.

Yours very truly

  
NORMAN H. ANDERSON  
Attorney General

COUNTY OFFICERS:  
COUNTY BOARD OF EQUALIZATION:

Members of the county board of equalization appointed by the city council under the provisions of Section 138.015, RSMo 1959, are entitled to five dollars per day compensation by the county as provided for in Section 138.020, RSMo. Supp. 1965.

OPINION NO. 88(1966)  
Opinion No. 460(1965)

June 2, 1966

Honorable Frank Conley  
Prosecuting Attorney  
Boone County Courthouse  
Columbia, Missouri



Dear Mr. Conley:

This is in answer to your request for an opinion on the question of whether members of the county board of equalization appointed by the city council under the provisions of Section 138.015, RSMo 1959, are entitled to the five dollars per day compensation provided for in Section 138.020, RSMo. Supp. 1965.

Section 138.020, supra, reads as follows:

"The judges of the county court, the county surveyor, the county assessor, the county clerk, and those sitting as members as may otherwise be provided, shall receive five dollars per day for each day they shall be present and act in the performance of their duties as members of the county board of equalization; provided, that the above county officers who are now or may hereafter be compensated by salary shall not be entitled to the compensation provided in this section."

Section 138.015, supra, reads as follows:

"For the purpose of giving cities organized under the provisions of article VI, section 19, of the constitution having less than three hundred thousand inhabitants representation on the county board of equalization when the board is sitting for the purpose of equalizing the assessment of property in such cities the cities shall have the same number

Honorable Frank Conley

of representatives thereon as such city was entitled to prior to the adoption of such constitutional charter. The representatives of the cities shall be appointed by the council, one of whom shall be the director of finance. The city council may prescribe the compensation the city members of the board of equalization shall receive from the city treasury."

Those ~~persons~~ appointed by the city as members of the county board of equalization under the provisions of Section 138.015, supra, are by reason of such membership county officers.

Under Section 138.020, supra, city members of the county board of equalization are entitled to five dollars per day because they are those members sitting "as may otherwise be provided" unless they are precluded under the proviso.

The proviso precludes the "above county officers who are now or may hereafter be compensated by salary" from receiving the per diem. It is our opinion that the "above county officers" means those county officers who are paid a salary by the county for performance of their official duties.

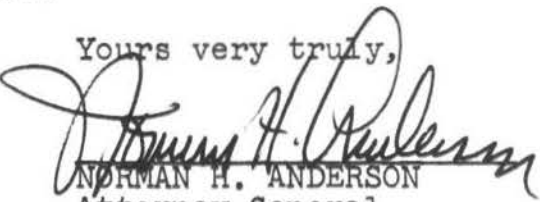
Therefore, city members of the county board of equalization are entitled to the five dollars per day compensation.

#### CONCLUSION

It is the opinion of this office that members of the county board of equalization appointed by the city council under the provisions of Section 138.015, RSMo 1959, are entitled to five dollars per day compensation by the county as provided for in Section 138.020, RSMo. Supp. 1965.

The foregoing opinion, which I hereby approve, was prepared by my assistant Walter W. Nowotny, Jr.

Yours very truly,

  
NORMAN H. ANDERSON  
Attorney General

COUNTY CLERKS:  
DEPUTY COUNTY CLERKS:  
DEPUTY COUNTY CLERKS, ALLOWANCE  
TO OFFICE FOR COMPENSATION:

The amount of money available to  
County Clerks in Third Class  
Counties under Section 51.450,  
RSMo Cum. Supp. 1965, for deputies  
and assistants does not have to  
be prorated but the entire amount may be used during the year 1965.

Opinion No. 89 (1966)  
Opinion No. 461 (1965)

February 16, 1966

Honorable Gene Thompson  
Prosecuting Attorney  
Nodaway County  
Maryville, Missouri 64468



Dear Mr. Thompson:

In your letter of November 29, 1965, you submitted in substance two questions to be answered:

1. Whether the increase in the amount available to county clerks, deputies, assistants, and clerical hire under Senate Bill No. 89, 73rd General Assembly (Section 51.450, VAMS) for the year 1965, has to be prorated or whether the entire amount may be used during 1965.
2. Whether the increase in compensation for prosecuting attorneys in third class counties is to be prorated on the calendar basis beginning October 13, 1965.

In an opinion issued by this office on November 19, 1965, it was held that the increase in the amount of money available to county clerks in third class counties for additional compensation for deputies and assistants under Section 51.450, RSMo Cum. Supp. 1965, does not conflict with Article VII, Section 13 of the Constitution of Missouri 1945, which prohibits the increase of compensation of a county officer during his term of office due to the fact that such individuals do not have a definite term of office and that the provisions in said Bill became effective October 13, 1965.

You inquire whether the county clerk may use the entire amount of money made available under said Bill for deputy and clerical hire during the year 1965, or whether the amount made

Honorable Gene Thompson

available for 1965, has to be prorated from October 13, 1965.

Section 51.450, RSMo Cum. Supp. 1965, paragraph 1, authorizes county clerks to employ deputies and assistants and provides that the amount of money to be allowed for their compensation is to be determined according to the population of the county and the salary of the clerk. Paragraph 2 provides that the county court may allow an additional sum not to exceed \$1,000 per annum to be used by said clerks solely for clerical hire. The need for additional clerical hire and the compensation is to be determined by the county court. Apparently the question you submitted refers to the increase that may become available under paragraph 1.

Article III, Section 39(3), Constitution of Missouri 1945, provides that the General Assembly shall not have power:

"To grant or to authorize any county or municipal authority to grant any extra compensation, fee or allowance to a public officer, agent, servant or contractor after service has been rendered or a contract has been entered into and performed in whole or in part; (Sec. 48, Art. IV, Const. of 1875)."

Under this provision of the Constitution an increase in compensation, fee, or allowance of extra compensation, fee, or allowance to a public officer, servant, or contractor can not be granted after the service is rendered or after the contract is performed in part. Under this provision deputies, assistants, and clerks in the office of the county clerk could not be paid any additional compensation after the service is performed even though the money may be available.

Section 51.450, RSMo Cum. Supp. 1965, paragraph 1, the county clerks in third class counties are entitled to employ deputies and assistants and determine the compensation to be paid said deputies and assistants within their discretion from the amount of money made available according to the population of the county and the salary of the clerk. It is a matter of discretion under paragraph 1, of Section 51.450, Cum. Supp. 1965, with the county clerk as to the number of deputies and assistants that he may need at a given time and the compensation that he may pay them. The only limitation as to the use of the money is the limitation as provided for in Article III, Section 39(3), Constitution of Missouri 1945, above referred to. The money made available for pay to deputies and assistants does not have to be prorated over any given period of time.

In regard to the second question you have submitted, I am enclosing herewith an opinion issued by this office on

Honorable Gene Thompson

December 2, 1965, to Honorable Haskell Holman, State Auditor, Jefferson City, Missouri, which holds that the compensation provided for in Section 56.291, RSMo Cum. Supp. 1965, became effective October 13, 1965, and that the compensation is to be prorated on a yearly basis from that date.

CONCLUSION

It is the opinion of this office that the amount of money available to county clerks in third class counties under Section 51.450, RSMo Cum. Supp. 1965, for deputies and assistants does not have to be prorated but the entire amount may be used during the year 1965, provided that services already rendered may not be compensated in violation of Article III, Section 39(3), Constitution of Missouri 1945.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Moody Mansur.

Very truly yours,

  
NORMAN H. ANDERSON  
Attorney General



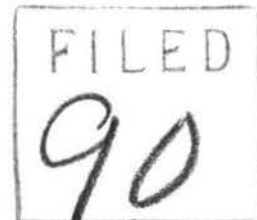
DRAINAGE DISTRICTS:  
WARRANTS:

Warrants issued by a Circuit Court Drainage District organized under Chapter 242, RSMo 1959, are valid if provisions thereof are met.

March 21, 1966

OPINION NO. 90

Honorable William Fickle  
Member, House of Representatives  
Platte County  
7406 Tomahawk Road  
Parkville, Missouri



Dear Representative Fickle:

This is in response to your request for an official opinion of this office respecting the power of Circuit Court organized Drainage Districts, which reads in part as follows:

"The Board proposes to issue warrants for the completion of the work on the Plan of Reclamation and the local bank has agreed to pay them and accept an assignment of the same, however, it has raised the question of the validity of the warrants issued when the District is without sufficient funds, in view of Section 246.070 through 246.130, Revised Statutes of Missouri 1959, which provides for the issuance of tax anticipation warrants.

"It would appear that Section 242.630 is still the law and that it was not impliedly repealed by Section 246.070 through 246.130 \* \* \*"

The Farley-Beverly Drainage District is a circuit court drainage district organized in 1953, pursuant to the appropriate statutory provisions set out in Chapter 242. (All statutory references are RSMo 1959). We understand that it has become necessary to obtain money to fulfill the purposes for which the district was organized and a question has arisen as to the validity of warrants issued by the district in conformance with the appropriate statutory provisions of Chapter 242. Section 242.210 provides the form of

Honorable William Fickle

such warrants and Section 242.630 provides the interest rate should the warrants be not paid. The problem arises as to the validity of warrants issued under Chapter 242 in the light of Chapter 246 which sets out one manner and procedure for the issuance of tax anticipation warrants by drainage districts which may be contended to be somewhat in conflict with Chapter 242.

The Supreme Court of Missouri in *Graves v. Little Tarkio Drainage District No. 1*, 134 SW 2d 70, 80, considered the problem of the possible conflict between what are now Chapters 242 and 246. The Supreme Court in that case ruled that the provisions of Chapter 242, germane to the issuance of warrants were not impliedly repealed by Chapter 246. In ruling that Chapter 246 does not indicate a legislative intention that such statutes would thereafter provide the exclusive method of issuance of warrants the Court states:

"[24] Respondents finally contend that the provisions of article 10, c. 64, sec. 11024 et seq., R.S. 1929, Mo.St.Ann. §11024 et seq., p. 3663 et seq., provide an exclusive method by which indebtedness may be incurred and tax anticipation warrants may be issued, and that said sections were not complied with. (These sections are presently located in Chapter 246 RSMo 1959). These sections were passed in 1929 (Laws 1929, p. 190, §§ 1-7) and limit in amount and in time of maturity warrants which may be issued thereunder and expressly require the assent of the owners of  $\frac{2}{3}$  the acreage of the district. A review of said new sections discloses that they cover some rights previously enjoyed by districts and add other new and different rights, but there is nothing to indicate an intention that said sections should thereafter provide the exclusive method for issuance of warrants by drainage districts. Said sections gave new and additional powers but did not necessarily take away rights then possessed by the district. Districts had the power to issue warrants for indebtedness, Sec. 10775, R.S. 1929, Mo.St.Ann. § 10775, p. 3503, but did not have the power to sell warrants in order to buy machinery, drag lines and equipment and then to pay the said warrants out of the maintenance fund. \* \* \*"  
Loc. cit. p. 80. (Emphasis Ours)

Honorable William Fickle


Section 10775 RS 1929 referred to in the Graves case above is now Section 242.630, RSMo 1959.

The Court also stated that all terms and provisions of the Drainage Act would be construed broadly and liberally to effectuate the uniform and beneficial motives which prompted its enactment.

CONCLUSION

It is therefore the opinion of this office that warrants issued by a Circuit Court Drainage District organized under Chapter 242, RSMo 1959, are valid if the requirements in Chapter 242 are met.

Yours very truly,

  
NORMAN H. ANDERSON  
Attorney General

TAXATION: Non-resident military personnel who is or has  
MILITARY PERSONNEL: personal property temporarily in this state  
does not owe personal property tax to the state.

August 30, 1966

OPINION NO. 91 (1966)  
OPINION NO. 463 (1965)

Honorable George C. Baldrige  
Prosecuting Attorney for Jasper County  
Courthouse, 6th and Pearl  
Joplin, Missouri



Dear Mr. Baldrige:

This opinion is in response to your inquiry of the liability of military personnel for personal property tax upon his alleged property being used by his family located in Missouri when such personnel (who claims to be a resident of another state) is overseas pursuant to military duty.

Section 574, Title 50, USCA reads, in pertinent parts, provides as follows:

"(1) For the purposes of taxation in respect of any person, or of his personal property, income, or gross income, by any State, Territory, possession, or political subdivision of any of the foregoing, or by the District of Columbia, such person shall not be deemed to have lost a residence or domicile in any State, Territory, possession, or political subdivision of any of the foregoing, or in the District of Columbia, solely by reason of being absent therefrom in compliance with military or naval orders, or to have acquired a residence or domicile in, or to have become resident in or a resident of, any other State, Territory, possession, or political subdivision of any of the foregoing, or the District of Columbia, while, and solely by reason of being, so absent. For the purposes of taxation in respect of the personal property, income or gross income of any such

Honorable George C. Baldridge

person by any State, Territory, possession, or political subdivision of any of the foregoing, or the District of Columbia, of which such person is not a resident or in which he is not domiciled, compensation for military or naval service shall not be deemed income for services performed within, or from sources within, such State, Territory, possession, political subdivision, or District, and personal property shall not be deemed to be located or present in or to have a situs for taxation in such State, Territory, possession, or political subdivision, or district. Where the owner of personal property is absent from his residence or domicile solely by reason of compliance with military or naval orders, this section applies with respect to personal property, or the use thereof, within any tax jurisdiction other than such place of residence or domicile, regardless of where the owner may be serving in compliance with such orders: Provided, That nothing contained in this section shall prevent taxation by any State, Territory, possession, or political subdivision of any of the foregoing, or the District of Columbia in respect of personal property used in or arising from a trade or business, if it otherwise has jurisdiction. This section shall be effective as of September 8, 1939, except that it shall not require the crediting or refunding of any tax paid prior to October 6, 1942. As amended Oct. 9, 1962, Pub. L. 87-771, 76 Stat. 768."

This office recognizes that the personal property of non-resident military personnel who are in this state pursuant to their military status is not taxable by this state. We have so held in Opinion Attorney General No. 93, addressed to Wayne W. Waldo dated January 8, 1953, (copy attached).

To state the facts involved as alleged by the legal assistance officer at Fort Leavenworth, who stated, "that during the tax year in question, he (the taxpayer) was stationed in Vietnam and had located his family in Missouri. He maintains that he is not a domiciliary of the State of Missouri but of the State of Kansas. He further maintains that the property located in

Honorable George C. Baldridge

Missouri was his sole property."

The United States Court of Appeals (5th Circuit-1964) has these comments about personal property exemption of military personnel in U.S. v. Arlington County, Commonwealth of Va. 326 Federal 2nd 929, 933:

"The County contends that his personal property ceased to be exempt from taxation when he was transferred pursuant to military orders to a post outside Virginia, but elected to leave his family and personal property in Arlington County for approximately a year and a half after the transfer. The district court agreed, and in so doing we think it read into the Act a limitation which is not there. In its opinion the court said:

"'Under [these] circumstances the personal property in question did not remain in Virginia by virtue of Captain Bottomley's military orders, and it is subject to the same personal property taxes as other personal property located in Virginia as of January 1, 1960.'

"As we read the Act it says that the serviceman shall not be deemed to have lost his residence or domicile in his 'home' state if he is absent therefrom solely in compliance with military orders. The Act then adds: with respect to taxation of such person's personal property -- that property shall not be deemed to be present in or to have a situs for taxation in such state; i. e., in a state in which he is deemed not to reside or be domiciled.

"[3,4] To put the matter in another way, the Act does not say that the serviceman shall not be deemed to have acquired a domicile in the host state because he was there by virtue of military orders -- it says he shall not be deemed to have lost his domicile in his 'home' state, and the Act further states that the



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same condition shall exist with respect to his personalty. Thus we think the Act makes it clear that the Congress intended to exempt the serviceman from taxation on his personal property except by his 'home' state. This is the rational conclusion to be drawn from *Dameron v. Brodhead*, 345 U.S. 322, 73 S.Ct. 721, 97 L.Ed. 1041 (1953), where the Supreme Court rejected an attempt by the host state to tax a serviceman's personalty because his 'home' state did not. The argument there being that the purpose of the Act was to prevent multiple taxation and since the 'home' state did not tax, the host state was free to do so. In rejecting the argument the Court said:

"In fact, though the evils of potential multiple taxation may have given rise to this provision, Congress appears to have chosen the broader technique of the statute carefully, freeing servicemen from both income and property taxes imposed by any state by virtue of their presence there as a result of military orders. It saved the sole right of taxation to the state of original residence whether or not that state exercised the right." 345 U.S. at 326, 73 S.Ct. at 724, 97 L.Ed. 1041 (Emphasis added.)

"On October 9, 1962, while this case was pending, the Congress amended the Act to provide that regardless of where the owner may be serving, his personal property may not be taxed except in his home state. Legislative history states that the change was made in order to clarify the original intent of the Act that only the 'home' state should have the right to tax. We do not need the change to read the Act as prohibiting the tax in question. The judgment is, therefore, reversed with directions to the court to enter judgment in conformity with this opinion."

The above opinion seems persuasive on the issue of taxation

Honorable George C. Baldrige

of personal property of non-resident military personnel within this state.

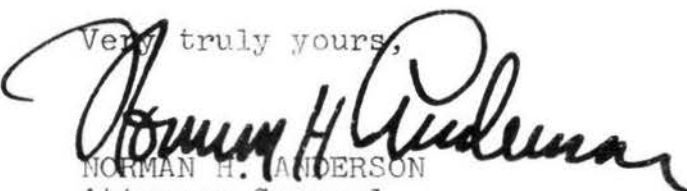
CONCLUSION

It is the opinion of this office that:

1. A non-resident serviceman who is or has personal property on a temporary basis in this State does not owe personal property tax to the State.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Richard C. Ashby.

Very truly yours,

  
NORMAN H. ANDERSON  
Attorney General

Enclosure:  
Opinion No. 93 (1953)

COUNTIES: The County of Jefferson cannot by ordinance grant  
COUNTY COURT: to Jeffco Cablevision, Inc., a right or an exclusive  
FRANCHISE: right to operate for a certain period, a community  
antenna and cable system in Jefferson County.

August 30, 1966

OPINION NO. 92 (1966)  
OPINION NO. 465 (1965)

Honorable William L. Pannell  
Prosecuting Attorney  
Jefferson County  
Hillsboro, Missouri



Dear Mr. Pannell:

This is in answer to your request for an opinion on the question of whether the County of Jefferson can by ordinance grant to Jeffco Cablevision, Inc., an exclusive right to operate for a certain period, a community antenna and cable system in Jefferson County.

The ordinance as filed November 30, 1965, in the County Court of Jefferson County, Missouri, is titled as follows:

"AN ORDINANCE AND ORDER GRANTING A FRANCHISE TO JEFFCO CABLEVISION, INC., ITS SUCCESSORS AND ASSIGNS, THE RIGHT TO OPERATE AND MAINTAIN A COMMUNITY ANTENNA AND CABLE SYSTEM IN THE COUNTY OF JEFFERSON: SETTING FORTH CONDITIONS ACCOMPANYING THE GRANT OF FRANCHISE: PROVIDING FOR REGULATION AND USE OF A COMMUNITY ANTENNA AND CABLE SYSTEM BY THE COUNTY: AND PRESCRIBING PENALTIES FOR THE VIOLATION OF ITS PROVISIONS."

The ordinance purports to grant an exclusive franchise to a private business, give easements to enable the business to operate, and to regulate the conduct of such business.

Section 1 of the ordinance reads as follows:

"In consideration of the faithful performance and observance of the conditions and reservations hereinafter specified, the exclusive right and privilege is hereby granted to JEFFCO CABLEVISION, INC., hereinafter referred to as Grantee, to establish, maintain and

Honorable William L. Pannell

operate antennae, and transmission and distribution facilities in the County of Jefferson and subsequent additions thereto, for the purpose of reception, transmission and distribution of audio-visual impulses and energy, both community antenna and closed-circuit, including programs recorded on film and tape or otherwise recorded in accordance with the laws and regulations of the United States of America and the State of Missouri and the ordinances and regulations of the County of Jefferson for a period of thirty (30) years from the date of acceptance hereof, with the option to renew the same for an additional period of thirty (30) years, upon the same terms and conditions herein provided for by giving written notice of the desire to do so at least six (6) months prior to the expiration hereof, subject to the conditions hereinafter provided."

Section 2 reads as follows:

"To enable said Grantee to establish, maintain, extend and operate its system in said County of Jefferson, the Grantee is authorized to erect, construct and maintain in, under, over, along, across and upon the roads, streets, lanes, avenues, sidewalks, alleys, bridges, and other public places of said County for the purpose of carrying on its business, poles, lines, guy posts, braces, tunnels, conduits, man-holes and such other things as are necessary to the safe and economical construction and operation of its properties and system."

Our understanding of how Jeffco will operate is that a large antennae will be erected to receive audio-visual impulses or television shows that are transmitted by television stations and then Jeffco will transmit these impulses to individual private television receivers by way of cables. A fee will be charged to hook onto the cable system to receive the impulses.

A franchise is commonly said to be "a special privilege conferred by the sovereign upon a citizen or citizens, which privilege is not common to the citizens generally." City of Poplar Bluff v. Poplar Bluff Loan & Building Association, Mo. App., 369 S.W.2d 764, 766.



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The court in State ex inf. Shartel, ex rel. City of Sikeston v. Missouri Utilities Co., 331 Mo. 337, 53 S.W.2d 394, quoted the following, l.c. 397:

"The rule must be considered settled, that no person can acquire a right to make a special or exceptional use of a public highway, not common to all the citizens of the state, except by grant from the sovereign power.' Jersey City Gas Co. v. Dwight, 29 N. J. Eq. 242, cited with approval in McQuillin on Municipal Corporations (2d Ed.) Sec. 1745, note 59, Vol. 4 pp. 643, 644."

The case involved the granting of a franchise by the City of Sikeston to an electrical company and the court went on to say, l.c. 397:

"The power to grant franchises resides in the state, and a city, in granting a franchise, acts as agent for the state. \* \* \*"

In Walker v. Linn County, 72 Mo. 650, the court said this, l.c. 653:

"That a county court is invested with such powers only as are expressly conferred upon it by statute, and such as may be fairly or necessarily implied from those expressly granted, we think cannot be questioned. \* \* \*"

Therefore there must be statutory authority for a county to be able to grant an exclusive franchise to operate a business and make use of public property.

We find no section of the Missouri Statutes empowering counties the right to grant a franchise to operate a business in the county. Nor do we find any section that permits the county to regulate the cable television industry.

There is a statute, Section 49.270, RSMo, giving the county court the power to control and manage county property. This section reads as follows:

"The said court shall have control and management of the property, real and personal, belonging to the county, and shall have power and authority to purchase, lease or receive by donation any property, real or personal, for the use and benefit of the county; to sell and cause to be conveyed any real estate, goods or chattels

Honorable William L. Pannell

belonging to the county, appropriating the proceeds of such sale to the use of the same, and to audit and settle all demands against the county."

There is also a statute, Section 229.100, RSMo, empowering the county court to regulate and allow the use of public roads for installing pipes and wires. This section reads as follows:

"No person or persons, association, companies or corporations shall erect poles for the suspension of electric light, or power wires, or lay and maintain pipes, conductors, mains and conduits for any purpose whatever, through, on, under or across the public roads or highways of any county of this state, without first having obtained the assent of the county court of such county therefor; and no poles shall be erected or such pipes, conductors, mains and conduits be laid or maintained, except under such reasonable rules and regulations as may be prescribed and promulgated by the county highway engineer, with the approval of the county court."

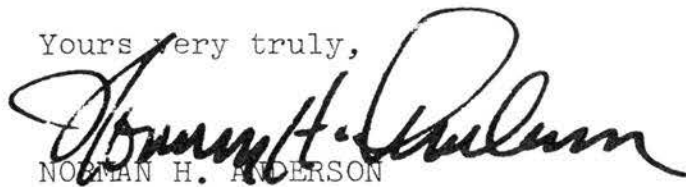
It is our opinion that these sections do not give the county the implied power to grant a franchise to operate a private industry.

#### CONCLUSION

It is the opinion of this office that the County of Jefferson cannot by ordinance grant to Jeffco Cablevision, Inc., a right or an exclusive right to operate for a certain period, a community antenna and cable system in Jefferson County.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Walter W. Nowotny, Jr.

Yours very truly,

  
NORMAN H. ANDERSON  
Attorney General



TAXATION:

MILITARY PERSONNEL: Nonresident military personnel having personal  
COUNTY COLLECTOR: property in Missouri can obtain a certificate  
of no tax due from the county collector. The  
collector, in the exercise of his discretion and judgment determines  
whether such military personnel is a bona fide nonresident within  
the purview of Section 301.025, RSMo 1959.

Opinion No. 95 (1966)  
Opinion No. 468 (1965)

February 16, 1966

Honorable Don E. Burrell  
Prosecuting Attorney  
Greene County  
Springfield, Missouri 65802



Dear Mr. Burrell:

This opinion is in response to your inquiry concerning the procedure and proof to be submitted by a soldier on duty status in Missouri to the county collector to establish that no personal property tax is due in order to purchase his automobile license plates.

The statutes, in pertinent parts, reads as follows:

Section 136.120, RSMo 1959 -

"The state collector of revenue shall have the power to prescribe such rules and regulations, not inconsistent with other provisions of law, as may be necessary to the efficient conduct of the division of collection. The state collector of revenue shall have the power to publish from time to time in pamphlet or booklet form said rules and regulations and the tax, licensing and fee laws of the state of Missouri. He shall distribute copies thereof for use of the public, but in his discretion may require payment of a reasonable charge therefor."

Section 301.025, RSMo 1959 -

"No state registration license to operate any motor vehicle in this state shall be issued unless the application for license is accompanied by a tax receipt or a statement certified by the county or township collector of the county or township in which the applicant's

Honorable Don E. Burrell

property was assessed showing that the state and county tangible personal property taxes for the preceding year have been paid by the applicant or that no such taxes were due. Every county and township collector shall give each person a tax receipt or a certified statement of tangible personal property taxes paid. Where no such taxes are due each such collector shall, upon request, certify such fact and transmit such statement to the person making the request. The director of revenue shall make necessary rules and regulations for the enforcement of this section, and shall design all necessary forms."

The Director of Revenue for this state, by his letter dated January 4, 1966, has advised this office that he has not issued any rules or regulations to be followed in similar cases.

We assume from your letter that you are interested in the procedure to be followed so that the soldier can buy a Missouri license. You state there is little doubt he keeps his legal residence in Nebraska. You also acknowledged the Opinion Attorney General No. 93, addressed to the Honorable Wayne W. Waldo, dated January 8, 1953, to the effect (among other things) that non-resident military personnel are exempted from payment of personal property tax. (See U.S. v. Arlington County, Commonwealth of Virginia et al, 326 Fed.2d 929, 933; California v. Buzzard, No. 40, decided at the October Term, 1965, by the U.S. Supreme Court, 34 Law Week 4087 and Snapp v. Neal, No. 16 decided at the October Term, 1965, by the U.S. Supreme Court 34 Law Week 4090, January 18, 1966) and secondly, the collector, upon request should certify that no taxes are due from such personnel in these instances.

Nowhere in Chapter 52 or in Chapter 139, RSMo 1959, or elsewhere in the statutes do we find any provisions covering this problem. The statutes do provide that the collector shall issue such a certificate and transmit it to the person requesting it (Section 301.025, RSMo 1959).

We find this comment on the problem in 67 CJS "Officers" Section 103, p. 371:

"\* \* \* A general grant of power, however, unaccompanied by definite directions as to how the power is to be exercised, implies the right to employ means and methods necessary to comply with statutory requirements\* \* \*."



Honorable Don E. Burrell

The above principle is accepted by the Missouri Supreme Court, en banc, in State ex rel. Bybee v. Hackman, 207 S.W. 64, 65; State ex rel. Bradshaw 208 S.W. 445, 448, etc.

We conclude therefore that there is no statutory procedure or rules published covering this problem area. When a request is made by a soldier to the collector to certify that no taxes are due, his decision should be one that is made by the collector dictated by his good judgment and reason and based on facts which would cause a reasonable man to act in the same or similar situation. If the collector is satisfied by the affidavit (as he apparently is in this case) that the soldier is a bona fide resident of another state, the collector should issue the certificate that no taxes are due.

We might suggest that a copy of the affidavit be forwarded to the county of alleged residence for verification of the facts alleged if you desire to pursue the matter further.

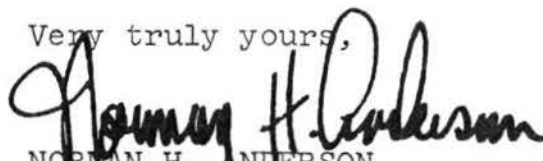
#### CONCLUSION

It is the opinion of this office:

The collector, in the exercise of good judgment and reason determines what he requires to satisfy his best judgment that the soldier is a bona fide resident of another state presently on duty in Missouri on military service and comes within the purview of Section 301.025, RSMo 1959, so as to be entitled to a certificate no such taxes were due.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Richard C. Ashby.

Very truly yours,

  
NORMAN H. ANDERSON  
Attorney General

Opinion No. 96 (1966)  
Opinion No. 472 (1965)  
Answered By Letter  
(Ashby)

March 3, 1966



Honorable Daniel V. O'Brien  
Prosecuting Attorney  
St. Louis County  
Courthouse  
Clayton, Missouri 63105

Dear Mr. O'Brien:

This letter is in response to your inquiry on the authority of the city council of a third class city within a first class county to levy less than one and a half mill tax (as prescribed in their ordinance) to fund a retirement system established under Section 86.583, RSMo.

The Ordinance No. 3418 of Kirkwood, Missouri (adopted by vote on November 5, 1946) in its preamble provides as follows in pertinent parts:

"\* \* \*Providing for the source of said fund; providing for an annual tax levy of one and one-half (1 1/2) mills on each one dollar of all taxable property assessed in said City and giving the City Council power to reduce and restore said tax rate; \* \* \*"

Section 9 of said Ordinance No. 3418 reads as follows:

"A tax of one and five-tenths (1 1/2) mills shall be levied on each dollar of value of all taxable property annually assessed in the City of Kirkwood, Missouri as the same appears on the tax books, which sum shall be earmarked in a separate fund, and set aside and made a part of the Policemen and Firemen Retirement Fund by the City, provided, however, that said sum shall not be used for or devoted to any purpose other than herein specified. Provided

Honorable Daniel V. O'Brien

further that whenever the Policemen and Firemen Retirement Fund from all sources reaches a sum equal to one and one-half (1 1/2) times the actuarial required reserve, the City Council may reduce the tax levy herein provided, and if necessary may subsequently restore the same."

(Emphasis Added)

Section 94.020, RSMo, provides the authority for the council to levy taxes and licenses in the following words:

"The city council shall, from time to time, provide by ordinance for the levy and collection of all taxes, licenses, wharfage and other duties not herein enumerated, and for neglect or refusal to pay the same shall fix such penalties as are now or may hereafter be authorized by law or ordinance."

A basic guide for construing ordinances is first to seek the intention of the lawmakers for the whole act and, if possible, to effectuate that intention. (Julian v. Mayor et al 391 S.W. 2d 864; May Department Store Company v. Weinstein, 395 S.W. 2d 525). Words should be given their plain and ordinary meaning to promote the object and purpose of the act. (Julian v. Mayor et al, supra; May Department Store Company v. Weinstein, supra.).

We believe the council, in its discretion, may reduce the tax levy provided in Ordinance No. 3418, when the Fund from all sources reaches a sum equal to one and one-half (1 1/2) times the actuarial required reserve. Under the ordinance as written, the requirement (that a sum equal to one and one-half times the actuarial required reserve be reached) is a condition precedent before such action can be taken by the Council. It appears that a sum equal to one and one-half times the actuarial required reserve, based on current information, is a product susceptible of mathematical calculation.

The term, "may", as used here, is believed to be permissive only and we believe therefore that such action rests solely in the discretion of the City Council (State ex Inf McKittrick v. Wymore, 119 S.W. 2d 941 1.c. 944).

We conclude, therefore, that when the fund reaches the

Honorable Daniel V. O'Brien

required status defined by Ordinance No. 3418, the City Council, in its discretion, may reduce the amount of the levy for the Firemen and Policemen Retirement Fund.

Very truly yours,

NORMAN H. ANDERSON  
Attorney General



February 1, 1966



Honorable John C. Vaughn  
Comptroller and Budget Director  
State Capitol  
Jefferson City, Missouri

Dear Mr. Vaughn:

This letter is in response to your inquiry of December 10, 1965. You refer to a previous ruling of this office (Opinion No. 217, Cohn, 7-25-62) and ask:

"Does the opinion referred to above indicate that a teacher, within the meaning of Section 169.010, Paragraph 6, would be ineligible to contribute to the Public School Retirement System of Missouri after age seventy because of the provision in Section 169.060, RSMo 1959?"

Opinion No. 217, supra, ruled that as to the State Public School Retirement System (Sections 169.010 - 169.130, RSMo):

"A. A teacher is automatically retired July first following the attainment of the age of seventy years and may not thereafter actively engage in teaching in public schools, except under the provisions of Section 169.560 as a substitute teacher;

"B. A school board may not legally pay a teacher's salary from the teachers fund created by Section 165.110, RSMo 1959, beyond July first next after the teacher has attained seventy years of age, except

Honorable John C. Vaughn

under the provisions for a substitute teacher as contained in Section 169.560;

"C. A school board may not legally contract with and employ a 'teacher' who is retired by the provisions of Section 169.060, RSMo 1959, except under the provisions of Section 169.560 regarding substitute teachers."

Your present question is answered by another previous ruling of this office (Opinion No. 24, Donahoe, 5-29-52, copy enclosed.) Opinion No. 24, in part, ruled:

"If a teacher who has reached the compulsory retirement age thereafter continues to teach, the board of trustees of the Public School Retirement System should not accept contributions withheld from the salary of the teacher, together with matching contributions of the employer. Nor should said teacher be allowed membership service credit because of services rendered after automatic retirement."

Opinions 217 and 24, supra, and Opinion No. 133, Vaughn, 8-4-65, should be read together.

Regarding your present inquiry, it is the opinion of this office that a teacher as defined by Section 169.010(16), RSMo. Supp. 1965, would not be eligible to contribute to the Public School Retirement System of Missouri after compulsory retirement by force of Section 169.060, RSMo 1959.

Yours very truly,

NORMAN H. ANDERSON  
Attorney General

LCD:df

Enclosure: Opinion No. 24 to  
Donahoe, 5-29-52.

AUTOMOBILES: Driving without a valid chauffeurs' or  
DRIVERS LICENSES: operators' license constitutes a "moving  
LICENSES: violation" as that term is used in Sec-  
MOTOR VEHICLES: tion 302.302-1(1), RSMo. Supp. 1965,  
POINT SYSTEM: and a conviction thereof requires an  
REVOCATION OF LICENSE: assessment of two points.

OPINION NO. 98 (1966)  
Opinion No. 474 (1965)

March 24, 1966



Honorable Robert P. Warden  
State Representative  
Jasper County - 2nd District  
415 Moffet  
Joplin, Missouri

Dear Representative Warden:

This is in answer to your request for an opinion of this office as to whether points may be assessed against an individual for being convicted of driving without a valid drivers license because either his license had expired or no license was ever issued.

The assessment of points for conviction of traffic violations is governed by Section 302.302, RSMo. Supp. 1965, the first paragraph of which provides:

"1. The director of revenue shall put into effect a point system for the suspension and revocation of chauffeurs' and operators' licenses. Points shall be assessed only after a conviction or forfeiture of collateral. The initial point value is as follows: \* \* \*"

Thereafter, several violations are listed together with the points to be assessed for each specified offense.

Since driving without a valid drivers license is not specified in any of these subparagraphs, this offense could be assessable only under subparagraph (1), of Section 302.302-1, which reads as follows:

Honorable Robert P. Warden

"(1) Any moving violation of a state law or county or municipal traffic ordinance not listed in this section, other than a violation of vehicle equipment provisions. . . . 2 points (except any violation of a municipal stop sign ordinance where no accident is involved, 1 point)."

A "moving violation" is defined in Section 302.010(10), RSMo. Supp. 1965, as follows:

"'Moving violation', that character of traffic violation where at the time of violation the motor vehicle involved is in motion, except that the term does not include the driving of a motor vehicle without a valid motor vehicle registration license, or violations of sections 304.170 to 304.240, RSMo., inclusive, relating to sizes and weights of vehicles;"

To determine whether the term "moving violation" includes the offense of driving without a valid drivers license, we must consider the primary rule of statutory construction; to ascertain the intent of the legislature and as far as possible to give effect to the intention expressed. Household Finance Corp. vs. Robertson, Mo. Banc., 364 S.W.2d 595; Lawyers' Association of St. Louis v. City of St. Louis, Mo.App., 294 S.W.2d 676.

It is unlawful for any person to drive a motor vehicle upon the highways of this State without a valid chauffeurs' or operators' license. Section 302.020, RSMo. Any person convicted of this offense shall be deemed guilty of a misdemeanor. Section 302.340, RSMo. Before an individual is issued a license he is required to pass both an oral and written examination which is also required of an individual who has failed to renew his license. Section 302.173, RSMo. Supp. 1965. A visual examination is also required of one seeking to renew his license. Section 302.175, RSMo. Supp. 1965. The reason for requiring drivers to be licensed and to take the prerequisite tests is to promote safety on the public highways. Department of Penal Institutions vs. Wymore, Mo.Banc. 1947, 165 S.W.2d 618. Although the possession of a valid drivers license does not insure the skill of a driver, the requirements for obtaining a license do allow the State to deny the privilege of driving to individuals it knows to be unqualified.



Honorable Robert P. Warden

The purpose of suspending or revoking the license of those who have been convicted of serious or numerous traffic violations is also to protect the public rather than to punish the offender. *Durfee vs. Ress*, Neb., 1957, 81 N.W.2d 148. The so-called "point system" is merely a legislative evaluation which sets the standard by which a negligent or hazardous driver may be determined. *Jones vs. Kirkman*, Fla. 1962, 138 So.2d 513; *Sturgill vs. Beard*, Ky. 1957, 303 S.W.2d 908. The fact that a person has accumulated an excess number of points indicates he is a negligent driver and more likely than others to become involved in an accident in which others would be injured.

As driving without a valid drivers license is a violation of State law which, by definition, must occur when the motor vehicle is in motion, the offense logically should be considered a moving violation within the meaning of Sections 302.010(10) and 302.302-1(1), RSMo. Supp. 1965. Such a construction is in harmony with the reason for requiring drivers to have a valid drivers license and for suspending or revoking the license of unsafe or unqualified drivers.

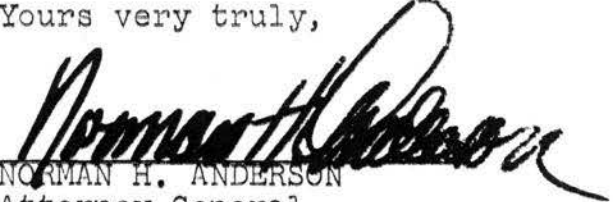
The only basis upon which we could conclude that points should not be assessed for such a conviction would be that the director has no authority to assess points against a none istent license. If this conclusion were valid we must also conclude that the director could not assess points under any of the provisions of Section 302.302, RSMo. Supp. 1965, against an individual who did not possess a valid license at the time of his conviction. This would prevent the State from keeping a person from taking an examination and obtaining a valid license even though he has been convicted of a number of traffic violations which would justify a suspension or revocation of his license as a hazardous driver.

#### CONCLUSION

It is therefore the opinion of this office, that driving without a valid chauffeurs' or operators' license constitutes a "moving violation" as that term is used in Section 302.302-1(1), RSMo. Supp. 1965, and a conviction thereof requires an assessment of two points.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. John H. Denman.

Yours very truly,

  
NORMAN H. ANDERSON  
Attorney General

SCHOOLS:  
CONSTITUTIONAL LAW:  
COOPERATIVE AGREEMENTS:  
PREKINDERGARTEN:  
ECONOMIC OPPORTUNITY ACT:  
ELEMENTARY AND SECONDARY  
EDUCATION ACT:

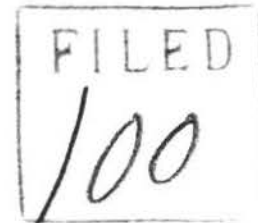
(1) School boards have the power to provide for the education of residents under five years of age. (2) Except as to those entitled to admittance as a matter of right, school boards have the power to regulate admittance ages. (3) As prescribed by Section 177.031, RSMo. Supp. 1965, school boards have the power to permit the free use of school buildings and facilities for prekindergarten programs. (4) School districts have the power to contract and cooperate with the Federal Government or its agencies or with a community action organization for the purpose of conducting prekindergarten programs under the Economic Opportunity Act and/or the Elementary and Secondary Education Act. (5) Article III, Section 38(a), Missouri Constitution 1945, authorizes school boards to receive Federal monies and to conduct prekindergarten programs as designated by the Federal Economic Opportunity Act and the Elementary and Secondary Education Act.

OPINION NO. 477 (1965)

No. 100 (1966)

January 18, 1966

Honorable Warren E. Hearnes  
Governor of Missouri  
Capitol Building  
Jefferson City, Missouri



Dear Governor Hearnes:

This official opinion is issued in response to your request dated December 13, 1965.

Since your letter sets forth in detail facts relevant to your inquiry we quote it in full:

"For eight weeks last summer, a pre-school program designated 'Project Head Start' operated in the school districts of 75 of Missouri's counties. This federally sponsored program is an effort to prepare children, whose development has been slowed by poverty, to enter kindergarten or first grade able to compete with their more fortunate classmates.

"Last summer this program served 16,364 children, utilizing 1,184 professionals and 2,072 volunteers. There were 451 stations throughout the State. The total cost of this program was \$2,434,056. Of this total amount, \$2,141,016 was supplied in the form of federal grants. \$293,040 represented the local contributions, which is



Honorable Warren E. Hearnnes

not required to be in cash. It may be an in-kind contribution and, therefore, provision of space, equipment, utilities, or personal services is acceptable.

"School Administrators have indicated near unanimous approval and overwhelming enthusiasm for continuation of the program. Present plans of the various school districts in the State call for a continuation of this program on a permanent basis. There is, however, a possibility that this worthwhile program may be in jeopardy.

"It is the opinion of the Commissioner of Education that school boards do not have the power to provide for education of children under five years of age. Since this program is designed to extend educational advantages of early childhood development to three, four, and five year olds, this would seem to indicate that the program would be significantly handicapped in the State of Missouri.

"I have been advised by the General Counsel of the Economic Opportunity Administration that in absence of a clear expression of Missouri law, they must, no later than January 15, examine their position relative to the implementation of Section A Title II of the Economic Opportunity Act of 1964 in the State of Missouri. I, therefore, request your official opinion whether the school districts of Missouri have the authority to provide this pre-kindergarten service, under the Economic Opportunity Act of 1964 and the amendments thereto. (P.L. 88-452, P.L. 89-253)

"The Elementary and Secondary Education Act of 1965 also provides federal grants for pre-kindergarten education. Under this Act, the federal government provides 100% of the cost. The Board of Education is the State authority empowered to approve or reject all applications from the various school districts for funding under this Act. They have indicated that the opinion that the school boards do not have the power to provide for the education of children under five years of age restricts the use of monies available under this Act to those children who are five and above.

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"The funds available under the Elementary and Secondary Education Act of 1965 are significantly greater than the funds available under the Economic Opportunity Act of 1964.

"Therefore, I also request your official opinion on whether or not school districts have the power to provide pre-kindergarten education under the Elementary and Secondary Education Act of 1965." (P.L. 89-10.)

Before considering the specific questions you ask, the primary principles generally applicable here must be noted.

School districts are public corporations. School boards possess only such powers as are expressly conferred or necessarily implied from the Constitution and statutes. 75 C.J.S., School and School District, Section 119.

The courts of this, and other States, have long followed the policy of construing school laws liberally in favor of promoting rather than limiting the extension of education to our citizens.

" \* \* \* It is . . . the duty of the courts to liberally construe our statutes relating to schools, and in such a manner as to open, and not to close, the doors of the schools against the children of the state. \* \* \* " State ex rel v. Clymer, 164 Mo.App. 671, 676.

" \* \* \* Our courts have frequently announced and heartily approved the salutary and time-honored principle that school laws will be construed liberally to aid in effectuating their beneficent purpose, \* \* \* " State v. Robinson, 276 S.W.2d 235, 240.

Indeed a contrary policy would not be expected where government is by the people. The strength of a democratic society is dependent upon the enlightened reason of its members. Without education, economic and political freedom are empty shells, mere ornaments devoid of substance.

Turning to the present questions, we are informed that certain state administrators have expressed the opinion that school boards do not have the power to provide education for

Honorable Warren E. Hearnese

children under five. Their opinion is based on the provisions of Section 171.091, RSMo. Supp. 1965. This section provides:

"The school board of any school district in this state may provide for the gratuitous education of persons between five and six and over twenty years of age, resident in the school district. The gratuitous education, however, shall be provided only out of revenues derived by the school district from sources other than those described in section 3, article IX, of the constitution of this state, and only with revenues which are not required for the establishing and maintaining of free public schools in the school district for the gratuitous instruction of persons between the ages of six and twenty years."

It is our understanding that it is the reasoning of these administrators that Section 171.091 is the source of school boards' power to educate persons between five and six and over twenty years of age; that since persons under age five are not mentioned in the statute by implication, there is no legal authority for a school board to educate such persons.

The hazard of such a course of reasoning is succinctly demonstrated by the fact that there is no express provision in Section 171.091 that school boards shall have the power to educate persons between six and twenty (although the existence of such power is implicitly recognized in the last sentence of Section 171.091). We are not aware of any statute which specifically empowers school boards to educate persons between six and twenty. If we follow the course of reasoning of these administrators, then school boards do not have the power to educate persons between six and twenty.

Section 160.051, RSMo. Supp. 1965, provides:

"A system of free public schools is established throughout the state for the gratuitous instruction of persons between the ages of six and twenty years. \* \* \*"

This statute would appear to imply the power to educate those between six and twenty. However, since this statute was enacted July 1, 1965, and no similar statute existed previously, we do not consider this statute to be the source of a school board's power to educate persons between six and twenty. This power has patently existed for decades prior to July 1, 1965. Therefore, Section 160.051, cannot be the source of this power.



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We are of the opinion that the source of a school board's power to provide for the education of the residents of the district is the statutes by which the legislature created and gave corporate existence to school districts.

They have one obvious purpose for their existence and that is to provide for the education of persons resident within the district. The power to achieve this purpose is so fundamentally inherent in the existence of school districts that although public schools have existed in this State from its origin, the legislature has never deemed it necessary to state expressly that such a power exists. The education of its residents is the very raison d'etre of a school district.

" \* \* \* a school district is but the arm and instrumentality of the State for one single and noble purpose, viz., to educate the children of the district -- a purpose dignified by solemn recognition in our Constitution \* \* \*." State ex rel v. Gordon, 231 Mo. 547, 133 S.W. 44, 51.

" \* \* \* They are public corporations, form an integral part of the state, and constitute that arm or instrumentality thereof discharging the constitutionally intrusted governmental function of imparting knowledge and intelligence to the youth of the state that the rights and liberties of the people be preserved. \* \* \*" School Dist. of Oakland v. School Dist. of Joplin, 102 S.W.2d, 909, 910.

Therefore, we are of the opinion that the power of a school district to provide for the education of all residents, without regard to ages, is necessarily implied from the statutes creating school districts.

Article XI, Section 1, Constitution 1875, provided:

"A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the General Assembly shall establish and maintain free public schools for the gratuitous instruction of all persons in this State between the ages of six and twenty years."

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The present Constitution provides, Article IX, Section 1(a):

"A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the general assembly shall establish and maintain free public schools for the gratuitous instruction of all persons in this state within ages not in excess of twenty-one years as prescribed by law. \* \* \*"

The extension of the age range by the present Constitution manifests a public policy of this State to provide free public education to those under six years. From this provision of the Constitution it is clear that, except as prohibited by law, a school district has the power to provide for the free education of all persons under twenty-one. This also supports the conclusion reached supra, viz., that school districts have the power to educate those age five and under.

The power to educate residents age five and under is further recognized by the provisions of Section 167.151(1):

"The school board of any district, in its discretion, may admit to the school pupils not entitled to free instruction and prescribe the tuition fee to be paid by them, except as provided in sections 167.121 and 167.131."

There are two groups who are not entitled to free education as a matter of right: nonresidents, and those outside the ages of six and twenty. Section 167.151(1), clearly expresses the power of school boards to admit at their discretion, resident children under age six.

The legislature, having granted the basic power to educate all residents, may from time to time limit and modify this power. However, except as limited by statute, the legislature has placed with school boards the authority to govern the schools and to determine such matters as admission ages. This authority is expressed by Section 171.011, RSMo. Supp. 1965:

"The school board of each school district in the state may make all needful rules and regulations for the organization, grading and government in the school district."

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As expressed by the Missouri Supreme Court in Roach v. The Board of President and Directors of the St. Louis Public Schools, 77 Mo. 484, 487-488:

" \* \* \* So far as the kind of school or the character and nature of the studies therein is concerned, the charter, like the grants, is unaccompanied with any conditions, express or implied. That whole subject is confided to the care and discretion of the defendant [school board], subject only to the laws of the land . . . ."

This office has previously ruled that, in absence of constitutional or statutory provision, the age at which a child may be admitted to school may be determined by the school board under authority of Section 171.011. Opinion No. 60, Medley, 5-4-56 (copy enclosed).

Subsequent to Opinion No. 60, the legislature has by statute prescribed the age a child may attend school as a matter of right. Section 160.051, RSMo. Supp. 1965. However, this statute does not affect the power of school boards to determine the admittance age of resident pupils who are not within the ages between which admittance is as a matter of right; namely, residents below age six or over age twenty. This power remains in the school boards.

Placing the regulation of such matters in the discretion of local school officials permits flexibility in adapting educational services to the needs and desires peculiar to the community. For example, prekindergarten would probably be unnecessary in an affluent suburban community, however, last summer's experience demonstrates that such a program is necessary and desired in poverty burdened communities.

Therefore, we are of the opinion that school districts have the power to provide for the education of residents age five and under and, except as to those entitled to admittance as a matter of right, the school board has the power to regulate admittance ages.

Public schools provide education both on a gratuitous and on a nongratuitous basis. Thus, one must distinguish between the power to provide education and the power to provide it gratuitously. The legislature and constitution place certain limitations on the providing of gratuitous education.



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Under the provisions of the 1875 Constitution, *supra*, the Supreme Court held in *Roach*, *supra*, that the State Public School Fund could not be used to provide gratuitous education to persons not within the ages of six and twenty.

Apparently as a result of the *Roach* case, the legislature enacted (Laws 1913, p. 717) what is not Section 171.091 (quoted *supra*), expressly authorizing school boards to provide, from certain local revenues, gratuitous education to residents between five and six and over twenty.

By application of the maxim of statutory construction, expressio unius est exclusio alterius (the expression of one thing is the exclusion of its alternative) one might conclude that the legislature, by expressly providing authority for using local revenue to educate those between five and six and over twenty, impliedly intended to prohibit the use of local revenue to provide gratuitous education to those under five.

However, such an implied restriction, if it exists, is one only on the use of funds. It does not take away the power to educate those under five. At most, Section 171.091 requires that if education is provided to those under five it may not be financed from local or State public revenue.

As all rules of statutory construction, the expressio unius rule is merely a guideline for finding meaning. It is subservient and must yield to the paramount key to the meaning of statutes, namely: the intention of the legislature.

When weighed against the public policy to educate beyond the ages of six and twenty as manifested in our present Constitution, restrictions implied by construction guides are not readily acceptable. We do not believe that the express policy of the Constitution should be derogated unless the intent to restrict is clearly expressed. There is no statute expressly prohibiting school districts from using local revenue to educate resident children under age five.

We do not rule upon this question since it is not necessary to this opinion, for the reason that no local or State revenue is used to finance the prekindergarten programs of which you inquire. The programs under the Elementary and Secondary Education Act of 1965 are financed one hundred percent by the Federal Government.

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Although the Economic Opportunity programs are financed by ninety percent Federal funds, it is our understanding that the ten percent local contribution is an "in-kind contribution", i.e., the school districts furnish the buildings and facilities. This, the school boards are clearly empowered to do by Section 177.031(2):

"The school board having charge of the schoolhouses, buildings and grounds appurtenant thereto may allow the free use of the houses, buildings and grounds for the free discussion of public questions or subjects of general public interest, for the meeting of organizations of citizens, and for any other civic, social and educational purpose that will not interfere with the prime purpose to which the houses, buildings and grounds are devoted. If an application is granted and the use of the houses, buildings or grounds is permitted for the purposes aforesaid, the school board may provide, free of charge, heat, light and janitor service therein when necessary, and may make any other provisions, free of charge, needed for the convenient and comfortable use of the houses, buildings and grounds for such purposes, or the school boards may require the expenses to be paid by the organizations or persons who are allowed the use of the houses, buildings and grounds. \* \* \*"

The foregoing discusses the powers of school boards, generally, to provide prekindergarten programs under the Economic Opportunity Act and the Elementary and Secondary Education Act 1965.

In addition there are some statutes applicable to specific situations which are relevant to your inquiry so far as these specific situations coincide with the Federal programs. We note these special statutes:

Under the general statutes, those between six and twenty are entitled as a matter of right to a free public education. Section 160.051; Article IX, Section 1(a), Missouri Constitution 1945. However, as to handicapped children resident within St. Louis County, all under twenty-one are entitled to free instruction from the special school district. The laws applicable to the special school district provide, Section 178.640(4), RSMo. Supp. 1965:



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"The special school district shall provide free instruction, classes, school or schools, for children under the age of twenty-one years, resident within the county, who are physically or mentally handicapped, including the blind or partially seeing, the deaf or hard of hearing, the crippled, and the mentally retarded or mentally deficient, who are capable of instruction or training, and for all other categories of physically or mentally handicapped children which are hereafter approved for special instruction by the state commissioner of education, including hyperkinetic children; those of the type having a malfunction in the area of behavior and learning where the brain does not function correctly because of immaturity on a genetic or metabolic basis and children having word-blindness, seizures and aphasia." (Emphasis added.)

Also as to vocational instruction, the statutes of the special district provide, Section 178.765(5), RSMo. Supp. 1965:

"The special school district shall provide free vocational instruction, classes or schools for children under the age of twenty-one years, resident within the county, in addition to its program of training for the handicapped. Entrance requirements shall be established by the board of education of the special school district subject to the approval of the state department of education. The vocational program of instruction shall be approved by the state department of education, and shall be so designed as to provide sufficient vocational and academic training for the student to receive a high school diploma at the completion of the twelfth grade." (Emphasis added.)

Thus, as to the special district, not only does it have the express power to educate those under five, but further it has the duty to instruct such residents gratuitously.

You inform us that prekindergarten programs were conducted during the Summer of 1965. Section 178.280, RSMo. Supp. 1965,

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provides that six-director districts may establish summer schools and may pay all costs for residents under age twenty.

Section 178.280 states:

"The school board of any six-director district, in its discretion, may establish and maintain summer schools, making all necessary rules and regulations therefor and fixing the rates of tuition of resident pupils above the age of twenty years and of others who are not entitled to receive free public school privileges in the district. At its discretion, the board may require tuition of all pupils resident in the district attending the summer school, or may provide for the payment of all or part of the cost thereof for those resident in the district under the age of twenty years from tax money of the district; but no funds from the state of Missouri shall be provided or used for the summer schools."  
(Emphasis added.)

Thus, as to summer schools, not only do six-director school boards have the authority to educate residents under age five, but they also have express authority to provide, at their discretion, such education gratuitously.

The prekindergarten programs discussed herein are not conducted as programs solely of a local school board but as cooperative programs with the Federal Government or community action organizations. The legislature has expressly authorized school districts to enter such cooperative programs.

Section 70.220, RSMo 1959, provides:

"Any municipality or political subdivision of this state, as herein defined, may contract and cooperate with any other municipality or political subdivision, or with an elective or appointive official thereof, or with a duly authorized agency of the United States, or of this state, or with other states or their municipalities or political subdivisions, or with any private person, firm, association or corporation, for the planning, development, construction, acquisition or operation of any public improvement or facility, or for a common service, provided, that the subject and purposes of any such contract or cooperative action made and entered into by such municipality

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or political subdivision shall be within the scope of the powers of such municipality or political subdivision. \* \* \*

This statute was enacted pursuant to similar provisions of Article VI, Section 16, Missouri Constitution 1945.

School districts are political subdivisions within Section 70.220, supra. Section 70.210, RSMo. Supp. 1965. Therefore, school boards have the power to cooperate with the Federal Government or community action organizations in prekindergarten programs under the Economic Opportunity Act and Elementary and Secondary Education Act to the extent consistent with the powers of school districts as set forth earlier.

The foregoing adequately supports our conclusion that school boards have the authority to conduct prekindergarten programs under the Elementary and Secondary Education Act or the Economic Opportunity Act. However, there is another source of this authority which we shall also discuss as a concurrent premise for our conclusion.

Participation by our State in Federal welfare programs such as the education programs here was foreseen by the delegates who drafted our present Constitution. Article III, Section 38(a), Missouri Constitution 1945, provides:

" \* \* \* Money or property may also be received from the United States and be redistributed together with public money of this state for any public purpose designated by the United States."

We are of the opinion that the Constitution empowers school districts to receive United States money accepted by the State and to carry out the public purposes for which the Federal Government has designated that the money be used.

Both Federal laws discussed here authorize the use of United States money for the purpose of providing education to those under five years. Thus, by virtue of Article III, Section 38(a), supra, the school districts of this State are authorized to use these Federal monies for prekindergarten programs.

During the Constitutional Convention an amendment was proposed to strike the above quoted provision of Article III, Section 38(a). The late Governor Park succinctly expressed his opposition to the amendment in these words, "If this amendment should be adopted . . . it would be the first time since 1865



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that a state has attempted to secede from the union." Transcript of Constitutional Debates(1945), Part 6, p. 2502. The amendment was overwhelmingly defeated.

These programs are financed from our Federal tax dollars. They were enacted by our Representatives in the National Congress. The benefits are available to every State. As reflected in Governor Park's statement, Article III, Section 38(a), was adopted so that Missouri could receive, equally with all other States of the Union, the full benefit of national welfare programs such as the Elementary and Secondary Education Act and the Economic Opportunity Act.

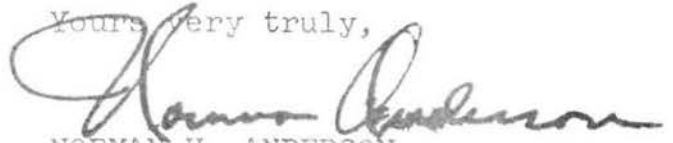
#### CONCLUSION

Therefore, it is the opinion of this office that:

1. School boards have the power to provide for the education of residents under five years of age;
2. Except as to those entitled to admittance as a matter of right, school boards have the power to regulate admittance ages;
3. As prescribed by Section 177.031, RSMo. Supp. 1965, school boards have the power to permit the free use of school buildings and facilities for prekindergarten programs;
4. School districts have the power to contract and cooperate with the Federal Government or its agencies or with a community action organization for the purpose of conducting prekindergarten programs under the Economic Opportunity Act and/or the Elementary and Secondary Education Act;
5. Article III, Section 38(a), Missouri Constitution 1945, authorizes school boards to receive Federal monies and to conduct prekindergarten programs as designated by the Federal Economic Opportunity Act and the Elementary and Secondary Education Act.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Louis C. DeFeo, Jr.

Yours very truly,

  
NORMAN H. ANDERSON  
Attorney General

Enclosure: Opinion No. 60,  
Medley, 5-4-56.



LIBRARY DISTRICTS: When a municipal library district becomes  
CITY AND COUNTY: part of a county library district, pursuant  
MERGER: to Section 182.030 RSMo 1959, beginning date  
EFFECTIVE DATE: of next fiscal year of the county library  
district following election in said municipal library district favoring merger, will  
be effective date of merger of such library districts.

Opinion No. 480 (1965)  
Opinion No. 103 (1966)

March 17, 1966



Honorable Donald E. Dalton  
Prosecuting Attorney  
St. Charles County  
St. Charles, Missouri

Dear Mr. Dalton:

This office is in receipt of your request for a legal opinion as to the effective date of the merger between the Wentzville City Library District and the St. Charles County Library District.

From the factual situation given in your letter, and pursuant to Section 182.030 RSMo 1959, an election was held in the City of Wentzville, Missouri, on November 16, 1965, to vote on the question, "Shall the library of the City of Wentzville be included with the St. Charles County Library District." Since the date of the opinion request, we have received information to the effect that the requirements, with reference to the election specified in Section 182.030, have been complied with.

On November 19, 1965, the results of the election, as certified by the County Clerk of St. Charles County, showed a majority of the votes cast were in favor of the merger of the two library districts. Your letter reads in part as follows:

" \* \* \* The question now arises as to the date when the municipal library district becomes a part of the County Library District. Section 182.030 Supra states, 'At the beginning of the

Honorable Donald E. Dalton

next fiscal year.' The quoted language does not seem to clarify whose fiscal year is referred to and the further question develops as to the meaning of the term 'fiscal year'."

Earlier in your letter, it is indicated the Wentzville City Library's fiscal year is from July 1st through the next June 30th, and the fiscal year of the St. Charles County Library District is from January 1st through the next December 31st. We understand your question as to which of the beginning dates of these fiscal years the above mentioned merger becomes effective.

Section 182.030 RSMo 1959, reads as follows:

"Whenever qualified electors equal to five percent of the total vote cast for governor at the last election in an existing municipal library district within the geographical boundaries of a proposed or existing county library district shall petition in writing the county court to be included in the proposed or existing county library district, subject to the official approval of the existing county library board, the qualified voters of the municipal library district shall be permitted to vote on the proposition for establishing or joining the county library district, and on the proposition for a tax levy for establishing and maintaining a free county library. If the proposition carries by a majority vote, the municipal library district shall become a part of the county library district at the beginning of the next fiscal year and the property within the municipal library district shall be liable to taxes levied for free county library purposes. If a majority of voters in the existing municipal library district oppose the county library district, the existing municipal library district shall continue."

(Underlining ours).

Our research fails to reveal any statutory definition of the terms "next fiscal year" as used in the above quoted section,

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and of necessity we must look to other sources for a suitable definition of said terms.

In the case of Union First & Savings Bank vs. City of Sedalia, Mo., 254 S.W. 28, the Court considered the terms "fiscal year" in connection with Article 10, Section 12, Constitution of Missouri, 1875, limiting the indebtedness a county, city or other political subdivision might incur in any year. We quote a portion of the opinion, pages 31-32, believed to be applicable to our discussion as follows:

"The term 'fiscal year' is defined by the leading lexicographers as follows: Funk & Wagnall's New Standard Dictionary defines the term 'fiscal year' as 'the financial year at the end of which accounts are balanced.' Webster's International Dictionary defines fiscal year as 'the year by or for which accounts are reckoned, or the year between one annual time of settlement or balancing of accounts, and another.'

"The Constitution says nothing about a 'fiscal year.' It simply uses the term 'year'. As to counties, the word 'year' as found in section 12 of article 10, Missouri Constitution, which we have quoted supra, has been held to mean a calendar year, or a year beginning January 1st and ending December 31st \* \* \*.

\* \* \* \* \*

" \* \* \* The fiscal year of the county by our rulings has been established as a calendar year \* \* \*.

\* \* \* \* \*

"As stated, supra, the Constitution does not specifically prohibit the fixing of a fiscal year different from the calendar year. The Constitution, section 12,

Honorable Donald E. Dalton

article 10, uses the words 'any year' followed by the words 'for such year.' It applies not only to counties, but to cities, towns, townships, school districts, and other political corporations and subdivisions of the state. \* \* \*

\* \* \* \* \*

" \* \* \* We therefore rule that the only period which can be considered (under the constitutional limitation upon the right to incur debts) is the calendar year, and the City of Sedalia could not by ordinance or otherwise, fix a different period of time as the basis for a bond issue."

While the Court found it necessary in the above mentioned case to define "fiscal year" in connection with its consideration of the constitutional and statutory provisions there involved, it is believed that such definition and its application is not limited to the circumstances of that case, or later cases involving the same or similar circumstances. It is believed the definition of "fiscal year" there given is also applicable to other situations involving statutes in which said terms appear, and the definition is helpful in construing "next fiscal year" appearing in Section 182.030, supra.

Referring again to that portion of Section 182.030, supra, which we have underscored, and considering the context in which same has been used, obviously the legislative intent was that a merger of a city and county library district, and the time when the city district would become a part of the county district shall be "at the beginning of the next fiscal year," of the county library district. The beginning of the next fiscal year would be that nearest, or the immediately following fiscal year of the county library district after the two library districts were merged. This is the only practical and reasonable construction which can be given the terms, for any other construction would pervert the plain or ordinary meaning of the express provisions of the section and result in confusion and uncertainty as to when the merger would become effective.

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With reference to the factual situation here involved, it will be recalled that the results of the election, indicating a majority vote had been cast in favor of the merger of the two library districts was officially certified on November 19, 1965. Thereafter, the nearest immediately following, or in the words of Section 182.030, supra, "the beginning of the next fiscal year" of the St. Charles County Library District, would be January 1, 1966, consequently, this date is the one on which the Wentzville City Library District becomes a part of the St. Charles County Library District, or the effective date of the merger of the two library districts.

#### CONCLUSION

Therefore, it is the opinion of this office that when a municipal library district becomes a part of a county library district, pursuant to provisions of Section 182.030 RSMo 1959, the beginning date of the next fiscal year of the county library district, following the election held in said municipal library district, favoring the merger, will be the effective date of the merger of such library districts.

The foregoing opinion which I hereby approve was prepared by my assistant, Paul N. Chitwood.

Yours very truly,



NORMAN H. ANDERSON  
Attorney General



COUNTY COURTS:  
SPECIAL ROAD DISTRICT:

The County Court is not required to deliver road machinery to a special road district unless the territory was in a pre-existing road district.

Opinion No. 104 (1966)  
Opinion No. 481 (1965)

March 8, 1966

Honorable Harold W. Barrick  
Prosecuting Attorney of Ralls County  
P.O. Box 278  
New London, Missouri



Dear Mr. Barrick:

You have requested an opinion from this office as follows:

"1. If a special road district is formed under Sections 233.170 to 233.315, R.S. Mo. 1959 from territory which had not previously been in a road district, what is the obligation of the County Court under Section 233.190 subsection 1 as to delivery of tools and machinery to the commissioners of the newly incorporated district where all tools and machinery were purchased by the County Court and not by any previous existing road district?"

Ralls County is not a township organization county and special road districts may be formed therein as provided for under Sections 233.170 to 233.315, VAMS.

Section 233.190, VAMS, provides in part:

"1. The county court shall, upon the organization of such commissioners, cause all tools and machinery used for working roads belonging to the districts formerly existing and composed of territory embraced within the incorporated district to be delivered to said commissioners, for which such commissioners shall give a receipt, and such commissioners shall keep and use such tools and machinery for constructing and improving public roads and bridges."

Sections 231.010 to 231.140, VAMS, provide that the county courts in all counties of the state shall divide each county into road districts of convenient size, road mileage and taxable property to be considered and each district to be numbered. They also provide for the county court to appoint a road overseer for

Honorable Harold W. Barrick:

each road district who shall execute a bond for the safe keeping and use of all tools, road machinery, records and papers that belong to the county or district.

You have informed us that the Ralls County Court has never complied with such statutory provisions and that Ralls County has never been divided into road districts by such County Court.

In considering the provisions of Section 233.190, supra, it is a basic rule of statutory construction to seek the intention of the lawmakers from the words used, if that is possible, and in doing so give to such words their plain and ordinary meanings so as to promote the object and manifest purpose of the statute. Baker vs. Brown's Estate, 294 S.W.2d 22, 365 Mo. 1159.

You state that the territory included in a newly formed special road district mentioned herein was not in any prior existing road district. Section 233.190, supra, provides that all tools and machinery used for working roads belonging to the districts formerly existing and composed of territories embraced within the new district shall be delivered by the county court to the commissioner of the special road district. Since there were no pre-existing districts, there would not be any road machinery used for working roads belonging to them. The intent and purpose of this statute is to require the county courts to turn over to special road districts the machinery used for working roads belonging to pre-existing districts whose territory was included in the special district. It was not intended for the county court to deliver road machinery of the county to a special road district when the territory incorporated in the special road district was not in any pre-existing road district.

Under the facts submitted herein it is our opinion that the County Court of Ralls County is not required to deliver any road machinery to the newly formed special road district because that district does not include any territory that was in a pre-existing road district.

#### CONCLUSION

It is the opinion of this office that under Section 233.190, VAMS, a special road district is not entitled to receive tools and road machinery from the county court unless the machinery was used for working roads belonging to pre-existing road districts that were incorporated in the special road district.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Moody Mansur.

Very truly yours,

  
NORMAN H. ANDERSON  
Attorney General

BLOOD SAMPLES: Neither the Greene County Coroner nor members  
CORONERS: of the Highway Patrol have authority to with-  
AUTOPSY: draw a sample of blood from the body of an  
individual killed in an automobile accident  
when no inquest is held.

OPINION NO. 487 (1965)  
OPINION NO. 110 (1966)

April 27, 1966

Honorable Don E. Burrell  
Prosecuting Attorney - Greene County  
Court House  
Springfield, Missouri 65802



Dear Mr. Burrell:

This is in response to your request for an official opinion  
of this office which reads in part as follows:

"Would you please be so kind as to give me the  
benefit of your thinking as to whether or not  
the coroner has the authority to authorize the  
Highway Patrol to withdraw a sample of blood  
from the deceased body [resulting from an auto-  
mobile accident for which no inquest was held],  
or if the coroner does not have this authority,  
does the Highway Patrol in its investigative  
capacity in regard to accidents occurring on  
the highway, have the authority to withdraw a  
sample of blood from the deceased for a purpose  
of analyzing it for alcohol content."

Prior to considering the questions posed we feel it necessary  
to point out that the term autopsy is discussed in a separate  
opinion (Opinion No. ~~28~~ ~~327~~, dated March 3, 1966, to Honorable Daniel  
O'Brien, Prosecuting Attorney, St. Louis County). Opinion No. ~~327~~ ~~28~~  
rules that the removal of a blood sample from a dead body by a  
coroner constitutes an autopsy.

This opinion does not discuss the collecting of blood samples  
from the scene of the accident. Since this blood is distinctly  
and irretrievably separate from the body, it is difficult to accept  
any argument to the effect that collection of such samples violates  
any right of sepulture held by the deceased's next of kin.

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While Opinion No. <sup>28</sup>~~327~~ deals with coroners of first class counties much of it is applicable to coroners of all counties in this state. While this is a separate opinion it is to be considered in light of Opinion No. ~~28327~~. This opinion considerably overlaps 327 but is not inconsistent with that opinion but deals with counties other than counties of the first class.

I.

The first question we will consider is whether or not the Greene County Coroner has the authority to withdraw a sample of blood from the body of an individual killed in an automobile accident when no inquest is held, or if he may authorize the Highway Patrol to remove such samples.

The primary statutory authority for the coroner is §58.260 RSMo 1959, as it applies to all coroners in the state. The principal case construing this section is Crenshaw v. O'Connell, 150 S.W. 2d 489, 235 Mo. App. 1085 (St. L. 1941).

Citing and approving the case of Patrick v. Employers Mutual Liability Insurance Company, (Mo), 118 S.W. 2d 116, the Court restricts coroners' authority to direct or order an autopsy to cases where an inquest has been held. It is stated in 150 S.W. 2d 1.c. 491:

"\* \* \* The law invests the coroner with no authority to have an autopsy performed except in connection with, and as an incident to, an inquest to be held before a jury upon the body of a person who is supposed to have come to his death by violence or casualty, the purpose of the inquest being to inquire, upon the view of the body, how and by whom such person came to his death."

In particular types of violent deaths the coroner of Jackson County, St. Louis County and St. Louis City have certain additional prerogatives (§58.451) not possessed under the pre-existing general statute as discussed in Opinion ~~327~~ 28.

The Court in Crenshaw points out the extent of the coroner's civil liability. In language particularly applicable to the present situation, the Court stated its conclusion that:

"\* \* \* It was never intended that the coroner should have the right to order an autopsy performed in any case where, in his mere judgment, an autopsy might be deemed proper for any such reason as the advancement of science or the like?"

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The Court proceeds to point out the nature of an autopsy conducted without an inquest:

"\* \* \* An autopsy performed except in connection with an inquest is unlawful and illegal, regardless of what might be the coroner's good faith in the exercise of a mistaken authority in the matter."

Opinion No. <sup>28</sup>~~37~~ to Honorable Daniel O'Brien, holds that the removal of blood samples from dead bodies constitutes an autopsy. The coroner cannot remove, nor can he authorize anyone else to remove, blood samples without an inquest. There is no statutory authority permitting the coroner to take such samples under any situation other than as an autopsy. The coroner possesses no legal right with respect to dead bodies except as prescribed by law. If the coroner removes blood samples, or attempts to authorize the Highway Patrol to remove blood samples, he is doing so without legal authority, even if such samples are collected from the embalmer. The coroner can be held civilly liable for trespass on a quasi-property right in the body held by some third party. It is stated in Hill v. Travelers Insurance Co. (Tenn.) 294 S.W. 1097, 1099, a case cited by the Court in the Patrick case, that:

"The damages recoverable in such a case are not for the injury done to the dead body, but are for the wrong or trespass on the plaintiff's right to the undisturbed possession and control of the body, measured by the mental anguish and suffering of the plaintiff occasioned thereby."

In Crenshaw, supra, the Court allowed damages for mental suffering even though the illegal autopsy was conducted in a scientific manner and no mutilation of the body, visible to the eye, occurred.

In view of the fact that a person entitled to the right of sepulture may be able to maintain an action against a coroner who has violated such right, and because we find no statutory authority permitting coroners to remove blood samples unless it is done as part of a legal autopsy, this office holds that a coroner cannot remove such samples nor can he authorize removal of such samples by the Highway Patrol.

## II.

In response to the second question as to whether or not the Highway Patrol has the authority to take blood samples from the body, it is our opinion that the Patrol has no such authority.



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Section 43.025, RSMo 1959, provides the Patrol shall enforce traffic (laws) and promote safety.

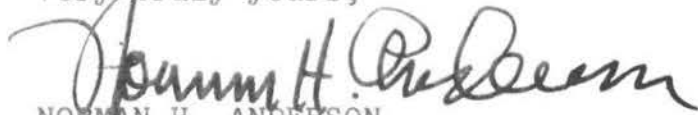
Section 43.220, RSMo 1959, limits the authority of the Patrol to those services and duties set out in Chapter 43. No autopsy power is provided.

Section 194.115, RSMo 1959, renders unlawful autopsies by anyone, under any situation, other than licensed physicians, and provides that any unlicensed person performing an autopsy is guilty of a misdemeanor.

CONCLUSION

It is the opinion of this office that neither the Greene County Coroner nor members of the Highway Patrol have authority to withdraw a sample of blood from the body of an individual killed in an automobile accident when no inquest is held.

Very truly yours,

  
NORMAN H. ANDERSON  
Attorney General

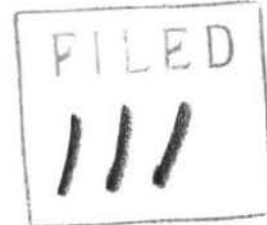
INSURANCE:  
MUTUAL INSURANCE COMPANIES:

Farmers Mutual Insurance Companies  
may not be authorized by the Super-  
intendent of Insurance to do an in-  
surance business outside the State  
of Missouri.

OPINION NO. 111 (1966)  
488 (1965)

November 15, 1966

Honorable Robert D. Scharz  
Superintendent, Division of Insurance  
Jefferson Building  
Jefferson City, Missouri



Dear Mr. Scharz:

Reference is made to your letter requesting the formal opinion  
of this office as follows:

"May a Farmers Mutual Insurance Company organized  
under the old Farmers Mutual Law (Sections 380.480  
to 380.570) which has, by authority of Section  
380.600, elected to be governed by the new 1953  
Farmers Mutual Act (Sections 380.580 to 380.840)  
be allowed by the Superintendent of Insurance to  
amend its Articles of Incorporation so as to do an  
insurance business outside the State of Missouri.

"We would like for you to assume in this question  
that the company has met all the financial require-  
ments necessary to operate on a statewide basis and  
also has the required net insurance at risk.

"For your information, we are of the opinion that  
this type of company cannot operate outside the  
State of Missouri because of the limitations placed  
on them by the old law. Further, we do not believe  
that the new law allows this because of the ter-  
ritorial restrictions placed on them for various  
lines of insurance and there is no explicit author-  
ity for this contained therein. We also do not be-  
lieve that it was the intention of the legislature  
to allow these companies to operate outside the  
state as they exempted them from the general insur-  
ance laws."

The 1953 Farmers Mutual Insurance Company Act (Sections 380.580

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to 380.840, RSMo 1959) was enacted by the 67th General Assembly as House Bill No. 249. The first section of the act is as follows:

"Sections 380.010, 380.020, 380.030 and 380.480, RSMo 1949, are repealed and thirty new sections enacted in lieu thereof, to read as follows:"

Sections 380.010, 380.020 and 380.030, RSMo 1949, provided for the incorporation of County Mutual Insurance Companies. Section 27 of House Bill No. 249, supra, (Section 380.009, RSMo 1959) prohibited the formation of County Mutual Insurance Companies after August 29, 1953.

Section 380.480, RSMo 1949, provided for the incorporation of Farmers Mutual fire and lightning, tornado, windstorm and cyclone, and hail Insurance Companies. Section 28 of House Bill No. 249, supra, (Section 380.479, RSMo 1959) prohibited the formation of Farmers Mutual Insurance Companies pursuant to the provisions of Sections 380.480 to 380.570, RSMo 1949, after the effective date of the act.

Section 29 of House Bill No. 249 (Section 380.600, RSMo 1959) provides that County Mutual Insurance Companies and Farmers Mutual Insurance Companies previously organized may elect to come under the provisions of Sections 380.580 to 380.840, RSMo 1959, the 1953 Farmers Mutual Insurance Company Act.

The territories in which the old County and Farmers Mutual Insurance Companies are authorized to issue insurance are specifically provided for by the statutes. Section 380.110, RSMo 1959, limits a County Mutual Insurance Company to insuring property within the county in which such company is organized. Section 380.490, RSMo 1959, provides that a Farmers Mutual fire and lightning Insurance Company shall do business only in the county in which it is organized, in adjoining counties, and in counties in which a county line of said county is not more than one mile distant from the county line of the county in which said company is organized. Section 380.500, RSMo 1959, provides that a Farmers Mutual tornado, windstorm and cyclone Insurance Company shall do business only in the congressional district in which it is organized, and, after such company has \$400,000.00 worth of property insurance, throughout the State of Missouri. Section 380.510, RSMo 1959, provides that a Farmers Mutual hail Insurance Company may do business throughout the State of Missouri.

The incorporation of Farmers Mutual Insurance Companies under the 1953 act is provided for by Section 380.590, RSMo 1959. Insofar as the question under consideration is concerned, the following provisions from the cited statute are significant:

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"Any number of persons, not less than one hundred, each owning insurable property in this state and within the territory in which they propose to operate \* \* \* may form an incorporated farmers' mutual insurance company for the purpose of mutually insuring the members thereof \* \* \* . \* \* \* Such articles of incorporation shall set forth \* \* \* the territory in which the company proposes to operate, the location of the principal or home office of the company which shall be within this state and within the territory in which the company operates, \* \* \* . \* \* \* Upon a showing of full compliance with all provisions of sections 380.580 to 380.840 \* \* \* the superintendent of insurance shall approve same (articles of incorporation) and deliver to such persons a certificate of authority for the operation of such farmers' mutual insurance company. \* \* \* "

The certificate of authority referred to in Section 380.590, RSMo 1959, is provided for by Section 375.010, RSMo Cum. Supp. 1965, which provides in part as follows:

"No company shall transact in this state any insurance business unless it shall first procure from the superintendent of the insurance division of this state a certificate \* \* \* authorizing it to do business \* \* \* ."

The kinds of insurance which a Farmers Mutual Insurance Company may make are set forth in Section 380.620, RSMo 1959, and are described by numbered paragraphs in the following categories: (1) Fire; (2) Windstorm; (3) Crops; and (4) Miscellaneous. Specific financial requirements to write the various kinds of insurance provided for by Section 380.620 are set forth in Section 380.630, RSMo 1959. Before making fire insurance policies a company must have 250 policy applications for at least \$500,000.00 net insurance at risk in not more than three adjoining counties. The territory may be increased to ten adjacent counties when the company has \$10,000,000.00 of net insurance at risk. The territory may be further increased to more than ten counties after the company has at least \$25,000,000.00 of net insurance at risk.

To make windstorm insurance, the requirements include at least 750 policy applications for at least \$2,000,000.00 net insurance at risk and not more than 10 per cent shall be in any one county. Thus, the statute contemplates policy applications in ten counties before the company commences business. It is further provided that a fire insurance company may issue policies for windstorm insurance if such a company has \$25,000,000.00 net insurance at risk, a safety fund of \$75,000.00 and operates in at least ten counties.

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To make crops insurance the requirements include 400 policy applications covering crops for at least \$400,000.00 of net insurance at risk in not less than eight counties. It is further provided that for a crops insurance company to make insurance against earthquake, flood, rain, drouth, etc., a company shall have at least \$12,250,000.00 net crop insurance at risk in at least 45 counties.

To make miscellaneous insurance it is provided that a company shall have at least \$100,000,000.00 net insurance at risk under one or more categories of fire, windstorm, or crops insurance and a safety fund of at least \$200,000.00. It is further provided that a company may make miscellaneous insurance alone if it maintains the requirements in regard to liabilities, reserves and amount of surplus for safety funds as required of fire insurance companies operating under the general insurance laws of this state.

Section 380.700, RSMo 1959, provides in part as follows:

"Any person having a risk insurable \* \* \* in the territory in which the company operates, may become a member of such company by insuring therein, and shall be entitled to all the rights and privileges appertaining thereto. \* \* \* "

Reference has been made to the many statutes which have some relevance to the question under consideration. The 1953 Farmers Mutual Insurance Company Act repealed the existing provisions for the incorporation of County and Farmers Mutual Insurance Companies. The new provisions for incorporation of Farmers Mutual Insurance Companies were enacted in lieu of the former provisions. The preamble to the act states that new sections **are** enacted relating to the same subject as the repealed sections. Therefore, the sections relating to the territory in which County and Farmers Mutual Insurance Companies are authorized to serve should be read together with the provisions concerning territory in the 1953 act in an attempt to arrive at the legislative intent. Statutes in pari materia should be construed together and compared with each other, and no portion of an act should be singled out for consideration apart from all legislation on the subject; *Fleming v. Moore Bros. Realty Co.*, 251 S.W.2d 8, 1.c. 15.

In considering this question, this office has also been guided by the rules of statutory construction as adhered to in *American Bridge Co. v. Smith*, 179 S.W.2d 12, 1.c. 15 as follows:

"[4,5] 'The primary rule of construction of statutes is to ascertain the lawmakers' intent, from the words used if possible; and to put upon the language of the Legislature, honestly and faithfully, its plain and rational meaning and to promote its object, and "the manifest purpose of the statute, considered historically," is properly given consideration.' *Cummins v. Kansas City Public Service Co.*, 334 Mo. 672, 66 S.W.2d 920, 925; *Artophone Corporation v. Coale*, 345 Mo. 344, 133 S.W.2d 343. \* \* \* "



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Applying the rules of statutory construction referred to above, it is noted that the insurance business of old County and Farmers Mutual Insurance Companies is restricted to the State of Missouri. It appears that one of the purposes of the new act was to provide a uniform code applicable to these companies. A review of the act does not reflect any express legislative intent to authorize such companies to extend their activities beyond the State of Missouri. The financial requirements for writing the various kinds of insurance authorized under the act reflect specific territorial restrictions to the State of Missouri. Fire, windstorm, crops and miscellaneous are the named categories of insurance which such companies may be authorized to make. The miscellaneous category is the only kind of insurance to which specific territorial limitations within the State of Missouri are not stated. However, it appears to this office that the provisions in regard to miscellaneous insurance when considered together in the same section with the provisions in regard to the other categories of insurance give rise to the clear implication that the territorial authorization for such insurance business is limited to the State of Missouri.

Furthermore, as required by Section 380.590, RSMo 1959, the proposed articles of incorporation of such a company must set forth, among other things, the territory in which the company proposes to operate. The proposed articles of incorporation are subject to approval, a certificate of authority is issued to the corporation. Such certificate of authority, issued pursuant to Section 375.010, RSMo Cum. Supp. 1965, authorizes a company to transact insurance business in this state. The Superintendent of Insurance has no power to issue a certificate of authority to a company to transact business outside the state of Missouri. It appears to this office that the Superintendent of Insurance is without authority to approve articles of incorporation which set forth territory to be served beyond the state of Missouri.

Other insurance companies organized in the state of Missouri are not restricted to the state of Missouri in the transaction of an insurance business. Such companies may not organize until the charters of such companies have been approved by the Superintendent of Insurance. However, the statutory provisions for the organization of such companies do not require that the charter set forth the territory in which such companies shall transact business. See life and accident stock insurance companies; Section 376.060, RSMo 1959; life and accident mutual insurance companies, Section 376.100, RSMo 1959; life and accident stock and mutual companies, Section 376.150, RSMo 1959; industrial and prudential insurance companies, Section 376.710, RSMo 1959; insurance other than life, stock companies, Section 379.035, RSMo 1959; mutual, fire and marine companies, Section 379.060, RSMo 1959; mutual companies other than life and fire, Section 379.210, RSMo 1959; reorganized insurance companies,

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Sections 379.520 and 379.525, RSMo 1959; and special charter companies accepting the general insurance laws, Sections 379.590 and 379.595.

Memoranda which have been submitted to this office in support of the contention that companies organized under the 1953 Farmers Mutual Insurance Company Act can do business beyond the state of Missouri have been carefully considered. It has been pointed out that the only territorial restrictions in the act are found in Section 380.630 which detail the financial requirements imposed upon companies to transact the various kinds of insurance business. The section imposes no territorial restrictions in regard to the kinds of insurance categorized as "miscellaneous". By reason of the maxim "expressio unius est exclusio alterius" it is agreed that companies authorized to transact miscellaneous insurance are not limited territorially to the state of Missouri. This opinion has concluded above that the provisions applicable to old County and Farmers Mutual Insurance Companies and the provisions of the 1953 Farmers Mutual Insurance Company Act, when considered and construed together, clearly imply that Farmers Mutual Insurance Companies are restricted in transacting business to the state of Missouri.

Kansas Home Insurance Company v. Wilder, 43 Kan. 731, 23 Pac. 1061 (1890), is cited in support of the argument that the only territorial restrictions are those recited in the provisions applicable to financial requirements. In the cited case, the court held that the company in question could not insure property beyond the limits of the state of Kansas because the company did not maintain a guaranty fund which was required by statute for companies to do business outside of Kansas. However, many other factors entered into and supported the decision. The court noted as follows, 23 Pac. 1063:

" \* \* \* The company is organized under chapter 132 of the Laws of 1885, and an examination of the provisions of that act, and the other statutes relating to mutual fire insurance companies leads us to the opinion that the legislature intended to confine the business of mutual fire insurance companies of the class to which the plaintiff belongs to the transaction of business within the state. \* \* \* "

The Court concluded as follows:

" \* \* \* While the language employed is not as explicit and clear as it might have been, and the proposition under consideration not wholly free from doubt, yet, when all the provisions of the legislature relative to mutual fire insurance companies are read together, it is reasonably clear that the legislature intended that such companies as have no guaranty fund can issue policies only on property situate in Kansas. \* \* \* "

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Therefore, it appears to this office that the conclusion being reached by this opinion has some support in the cited case.

It is further contended that authority to serve territory beyond the state of Missouri is implied in Section 380.590. The cited section provides among other things, that persons forming such a company must own property " \* \* \* in this state and within the territory in which they propose to operate \* \* \* " and that the location of the principal office " \* \* \* shall be within this state and within the territory in which the company operates \* \* \* ." It is argued that the references above to "in this state" are superfluous and redundant if such companies cannot lawfully operate beyond the state of Missouri. State v. Ralston-Purina Co. 358 S.W.2d 772, is cited in support of the proposition that effect must be given, if possible, to every part of the statute, including every word, phrase and sentence. The rule of construction is stated by the court as follows, l.c. 777:

"[1] We agree with the Court of Appeals, as stated at 343 S.W.2d 638 [3, 4], that the basic rule of statutory construction here applicable is that the court 'are to seek the intention of the lawmakers and to do so from the words used, if possible; ascribing to the language used its plain and rational meaning and giving significance and effect to every word, phrase, sentence and part thereof, if in keeping with that intent.' \* \* \* " (Emphasis added)

It is the view of this office that the conclusion being reached gives plain and rational meaning to the language used and that to give special significance to the words "in this state" so as to enlarge the later reference to "territory" as suggested would not be in keeping with the legislative intent as gathered from the entire act and related statutes on the same subject.

#### CONCLUSION


It is the opinion of this office that Farmers Mutual Insurance Companies organized under Sections 380.480 to 380.570, RSMo, may not be authorized by the Superintendent of Insurance to do an insurance business outside the state of Missouri. It is the further opinion of this office that any County Mutual Insurance Company operating under the provisions of Sections 380.040 to 380.270, RSMo, or any Farmers Mutual Insurance Company operating under the provisions of Sections 380.481 to 380.570, RSMo, which elects to come under the provisions

Honorable Robert D. Scharz

of Sections 380.580 to 380.840, RSMo, may not be authorized by the Superintendent of Insurance to do an insurance business outside the state of Missouri.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Thomas J. Downey.

Very truly yours,

  
NORMAN H. ANDERSON  
Attorney General

LIENS: When a new or used car is purchased in  
MOTOR VEHICLES: Missouri, a lien becomes perfected under  
MOTOR VEHICLE REGISTRATION: Section 301.600, RSMo Supp. 1965, upon  
delivery to the Director of Revenue of  
either the existing title or manufacturer's certificate of origin  
and the new owner's application for title consisting of any  
one of the copies of Department of Revenue form number MMV-1-R2  
along with the one dollar fee as required by Section 301.190, RSMo  
Supp. 1965.

Payment of the Missouri Sales Tax is not necessary to perfect  
a lien.

June 16, 1966



OPINION NO. 115  
(Revised August 16, 1966)

Honorable James E. Godfrey  
Representative for 3rd District  
of City of St. Louis  
Missouri House of Representatives  
418 Olive Street  
St. Louis, Missouri 63102

Dear Mr. Godfrey:

This is in answer to your request for an opinion on the proper  
way to perfect a lien under Senate Bill No. 149, 73rd General As-  
sembly, and whether or not the directive sent out by the Department  
of Revenue, Motor Vehicle Registration, dated January 24, 1966,  
properly perfects a lien under this new law.

Subsequently you advised us to consider only the situations of  
perfecting a lien made with new and used car purchases in Missouri.

Senate Bill No. 149 was enacted as Section 301.600 through  
301.670, RSMo Supp. 1965. The applicable section to your ques-  
tion is Section 301.600 which reads in part as follows:

"1. Unless excepted by section 301.650, a  
lien or encumbrance on a motor vehicle or  
trailer, as defined by section 301.010, is  
not valid against subsequent transferees or  
lienholders of the motor or trailer who  
took without knowledge of the lien or en-  
cumbrance unless the lien or encumbrance is  
perfected as provided in sections 301.600 to  
301.670.



Honorable James E. Godfrey

"2. A lien or encumbrance on a motor vehicle or trailer is perfected by the delivery to the director of revenue of the existing certificate of ownership, if any, an application for a certificate of ownership containing the name and address of the lienholder and the date of his security agreement, and the required certificate of ownership fee. It is perfected as of the time of its creation if the delivery of the aforesaid to the director of revenue is completed within thirty days thereafter, otherwise as of the time of the delivery."

In the situation where a new car is sold a certificate of ownership or title does not exist. Therefore, the lien is perfected upon delivery of proper application for a title and the required title fee. To perfect the lien the application for title must contain the following information: name and address of the lienholder; date of the security agreement.

In the situation where a used car is sold there is an existing title. Therefore, the lien is perfected by delivery of this title and proper application for title and the required title fee.

Section 301.190, RSMo Supp. 1965, is the section which provides for title application and also prescribes the fee of one dollar. Section 301.190 reads in part as follows:

"1. No certificate of registration of any motor vehicle or trailer, or number plate therefor, shall be issued by the director of revenue unless the applicant therefor shall make application for and be granted a certificate of ownership of such motor vehicle or trailer, or shall present satisfactory evidence that such certificate has been previously issued to the applicant for such motor vehicle or trailer. Application shall be made within thirty days after the applicant acquires the motor vehicle upon a blank form furnished by the director of revenue and shall contain a full description of the motor vehicle or trailer, manufacturer's or other identifying number, together with a statement of the ap-

Honorable James E. Godfrey

plicant's source of title and of any liens or encumbrances on the motor vehicle or trailer, provided that for good cause shown the director of revenue may extend the period of time for making said application."

Under this section the Director of Revenue has the duty of preparing a blank application form which must contain certain information including a statement of the source of title. The person who purchased the vehicle is the person who applies for title and who would pay the one dollar fee. However, delivery of the application for title and the one dollar fee does not have to be performed by the purchaser of the vehicle.

The Department of Revenue has prepared a blank form numbered MMV-1-R2 which is the application for Missouri title and/or license. This form provides for all the information required by Sections 301.190 and 301.600, supra. This form has six copies and copy No. 4 is labeled the lien perfection copy, and copy No. 5 is labeled the lienholder copy.

The Department of Revenue directive, dated January 24, 1966, states that for new vehicles the lienholder may either present the six copy application intact (copy No. 5 is not required), along with all applicable fees and the manufacturer's certificate of origin, or the lienholder may present copy No. 4 and if desired copy No. 5, along with the one dollar fee and the manufacturer's certificate of origin. In the second instance the remaining copies are sent in by the purchaser of the vehicle. For used car purchases the procedure is the same with the exception that the existing title is delivered in place of the manufacturer's certificate of origin.

When the lienholder delivers copy No. 4 and if desired copy No. 5, they are kept in a suspense file until receipt of the remaining copies. If the purchaser of the vehicle should deliver his copies first, then they are kept in a suspense file until receipt of copy No. 4 and the optional copy No. 5. The Department of Revenue actually treats the delivery of any one of the copies or any combination of copies as an application for title. Therefore, delivery of copy 4 is considered an application for title. The only necessity of delivery of the other copies, excluding copy 5, is that they must accompany the payment of the sales tax which is a prerequisite to issuance of title. Section 144.070, RSMo Supp. 1965.

Section 144.070, supra, reads in part as follows:

"1. At the time the owner of any new or used motor vehicle or trailer which was acquired in a transaction subject

Honorable James E. Godfrey

to sales tax under the Missouri sales tax law makes application to the director of revenue for an official certificate of title and the registration of said automobile or trailer as otherwise provided by law, he shall present to the director of revenue evidence satisfactory to said director of revenue showing the purchase price paid by or charged to the applicant in the acquisition of said motor vehicle or trailer, or that no sales tax was incurred in its acquisition, and if sales tax was incurred in such acquisition, such applicant shall pay or cause to be paid to the director of revenue the sales tax provided by the Missouri sales tax law in addition to the registration fees now or hereafter required according to law, and the director of revenue shall not issue a certificate of title for any new or used motor vehicle or trailer subject to sales tax as provided in said Missouri sales tax law until the tax levied for the sale of the same under sections 144.010 to 144.510 has been paid as herein provided."

It is our opinion that this section does not make the sales tax or payment of same a part of the application for title but merely says that until the tax is paid title will not be issued. Therefore, payment of the tax and delivery of the accompanying copies is not necessary to perfect the lien because under Section 301.600, supra, perfection of the lien does not occur on issuance of title but only on delivery of application for title.

#### CONCLUSION


It is the opinion of this office that when a new or used car is purchased in Missouri a lien becomes perfected under Section 301.600, RSMo Supp. 1965, upon delivery to the Director of Revenue of either the existing title or manufacturer's certificate of origin and the new owner's application for title consisting of any one of the copies of Department of Revenue form number MMV-1-R2 along with the one dollar fee as required by Section 301.190, RSMo Supp. 1965.

Honorable James E. Godfrey

It is our further opinion that payment of the Missouri Sales Tax is not necessary to perfect a lien.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Walter W. Nowotny, Jr.

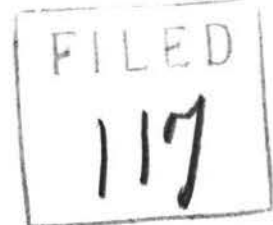
Yours very truly

A handwritten signature in dark ink, appearing to read "Norman H. Anderson". The signature is fluid and cursive, with the first name "Norman" being the most prominent part.

NORMAN H. ANDERSON  
Attorney General

Opinion No. 117  
Answered by Letter (DeFeo)

January 11, 1966



Mr. G. L. Donahoe  
Executive Secretary  
Public School Retirement System  
Farm Bureau Building  
Jefferson City, Missouri

Dear Mr. Donahoe:

In reply to your inquiry of November 30, 1965, and in confirmation of our telephone conversations:

It is my opinion that tax deductions under P.L. 89-97, (commonly known as Medicare) are to be included in "the amount of Federal Social Security taxes" used to calculate the contribution rate for the Non-Teacher School Employee Retirement System as proved by Section 169.620(4), RSMo. Supp. 1965.

P.L. 89-97, amends the Social Security Act by adding sections; viz., 42 U.S.C. 401-425. P.L. 89-97, also amends Section 3101 of the Internal Revenue Code of 1954 (U.S.C. 3101), and provides the following tax rates in 1966, for: Old-Age, Survivors, and Disability Insurance, 3.85 percent; Hospital Insurance, 0.35 percent. Provision is also made for increasing these rates in subsequent years.

Therefore, the Non-Teacher contribution rate should be reduced for 1966 by 4.2 percent, as to wages upon which Social Security taxes are deducted.

Yours very truly,

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NORMAN H. ANDERSON  
Attorney General

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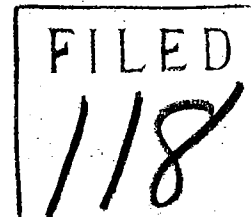
FINANCIAL STATEMENTS:  
WATER SUPPLY DISTRICTS:

A public water supply district, formed under the provisions of Section 247.010 to 247.220, required to file financial reports.

February 2, 1966

OPINION No. 118

Honorable William Fickle  
Missouri House of Representatives  
Representative of Platte County  
7406 Tomahawk Road  
Parkville, Missouri



Dear Mr. Fickle:

Your request for an opinion, dated January 4, 1966, is as follows:

"Section 105.145, Revised Statutes of Missouri, 1959, requires certain political subdivisions of the State of Missouri to make annual reports of financial transactions. Does this statute include public water supply districts, formed under the provisions of Sections 247.010 to and including 247.220? In the event that such districts are included within the provisions of Section 105.145, must all of the information required under subsection 3. be included, or can the district file a copy of the annual audit required by Section 247.080-2 in lieu of the annual report required by Section 105.145-3?"

Although you refer to Section 105.145 RSMo 1959, we are sure you intended to refer to Section 105.145 RSMo Supp. 1965.

In your first question you ask if Section 105.145 Mo.Supp. 1965, which requires certain political subdivisions of the state to make annual reports of financial transactions, includes public water supply districts. The districts are formed under the provisions of Section 247.010 to Section 247.220 RSMo 1959.

Section 247.020 provides that public water supply districts formed under these sections shall be political corporations of the state.

Honorable William Fickle

Section 247.050, paragraph 11, provides that they shall certify to the county courts the amount of money to be provided by a levy of a tax upon all the taxable property within the district.

Section 105.145(1) defines a political subdivision as any agency or unit of the state except counties and school districts, which is authorized to levy taxes or empowered to cause taxes to be levied.

It will be seen that a public water supply district is included because it is empowered to "levy taxes or cause taxes to be levied," under Section 247.050.

Section 105.145 RSMo Supp. 1965, requires that the governing body of each political subdivision shall, within 60 days following the end of a fiscal year, prepare an annual report of its financial transactions.

Paragraph 3(1) sets forth with particularity exactly what the financial reports shall contain.

Paragraph 5 requires that a copy of this report be remitted to the state auditor.

Paragraph 4 of Section 105.145 is as follows:

"Any political subdivision required by other laws of this state to prepare and publish an annual or semiannual financial report may comply with this section by filing a copy of its annual report prepared according to law, and, when semiannual reports are required, by filing together copies of such reports, prepared according to law. The reports shall be filed with the state auditor within the time herein specified."

Your next question is, may a public water supply district under the authority of paragraph 4, send in a copy of its annual audit, which it is required to make under Section 247.080(2), and thus comply with the requirements of paragraph 2 and paragraph 3, supra. Section 247.080 RSMo 1959, paragraph 2, provides, "It (the board of directors) shall have made by a competent accountant an annual audit of the receipts and expenditures of the district." Note that there is no provision that this audit be published, hence such an audit would not fulfill the requirements set out in paragraph 4, quoted above.

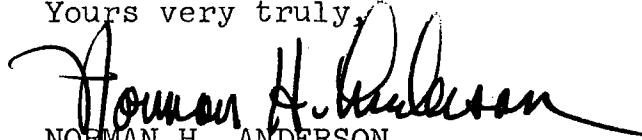
Honorable William Fickle

CONCLUSION

For the reasons stated herein, it is the opinion of this office that a public water supply district formed under the provisions of Section 247.010 to 247.220 RSMo 1959, is subject to the requirements under Section 105.145 Mo. Supp. 1965, and is required to prepare and to send to the state auditor a report of its financial transactions as provided under Section 105.145 Mo. Supp. 1965.

The foregoing opinion, which I hereby approve, was prepared by my assistant, O. Hampton Stevens.

Yours very truly,

  
NORMAN H. ANDERSON  
Attorney General

DEPOSITS IN COURT: The circuit clerk of a first class county has  
CIRCUIT COURT: the discretionary power and authority to invest  
CIRCUIT CLERKS: funds deposited in the registry of the court in  
the manner provided for in Section 483.310, RSMo  
1959, and to use the income derived therefrom as  
provided therein.

September 8, 1966

OPINION NO. 120 (1966)  
OPINION NO. 148 (1965)

The Honorable Louise Grant Smith  
Circuit Clerk of St. Louis County  
County Court House  
Clayton, Missouri 63105



Dear Mrs. Smith:

This is in answer to your request for an opinion on two ques-  
tions concerning Section 483.310, RSMo 1959.

Your first question is whether a circuit clerk can invest funds  
deposited in the registry of the court in other investments than that  
set out by Section 483.310, RSMo 1959. This section reads as follows:

"The circuit clerk in counties of the  
first class are hereby authorized and  
empowered to invest funds placed in the  
registry of the circuit court in savings  
deposits in banks carrying federal deposit  
insurance to the extent of the insurance  
and the income derived therefrom shall  
be used by the circuit clerk for paying  
the premiums on bonds of employees of  
the circuit clerk, rent on safety deposit  
boxes, printing of pamphlets or booklets  
of the rules adopted by the circuit court,  
circuit clerk and forms used in the cir-  
cuit court which comply with the statutes  
of the state of Missouri and the rules of  
the supreme court, copies of which shall  
be distributed to litigants and members  
of the bar practicing in said court, and  
the balance, if any, shall be paid into the  
general revenue fund of the county."

The Honorable Louise Grant Smith

C. J. S., Deposits in Court, Section 1, says that:

"A deposit in court arises where property or funds are placed in charge of an officer of the court for safekeeping pending litigation, as, for example, until the question as to who is entitled to the possession is determined, or when money is paid into court as security or for some other purpose."

The duty of the clerk regarding such funds is set out in Section 483.075 (1), RSMo 1959, where it says that every clerk shall:

"\* \* \* keep a perfect account of all moneys coming into his hands on account of costs or otherwise, and punctually pay over the same."

Subsection 1 of Section 483.025, RSMo 1959, requires every clerk to enter into bond and Subsection 2 says that the Bond shall be conditioned that the clerk will:

"\* \* \* faithfully perform the duties of his office, and pay over all moneys which may come to his hands by virtue of his office, \* \* \*."

The Supreme Court has said concerning money deposited in court from condemnation proceedings that the clerk held the money in trust. *Snyder v. Cowan*, 120 Mo. 389, 25 S.W. 382, 383; *State ex rel. Scott v. Trimble*, 308 Mo. 123, 272 S.W. 66, 71. The Kansas City Court of Appeals has also said that if the clerk received the money in his official capacity then he is an insurer of the fund. *State ex rel. Courtney v. Calloway*, 208 Mo. App. 447, 237 S.W. 173, 176. And, in another case concerning money from a condemnation proceeding the same court said that the clerk received the money by virtue of his office, and it was the clerk's duty to pay the money out under decree of the court. *State ex rel. and to Use of Clinkscates v. Scott*, 216 Mo. App. 114, 261 S.W. 680, 682.

The clerk, then, must pay out the funds when ordered to do so by the court. This necessitates keeping the funds safe and having them readily available.

Section 558.220, RSMo 1959, originally enacted in 1853, prohibits public officials from "loaning" money which comes to them in their official capacity and reads as follows:



The Honorable Louise Grant Smith

"No officer appointed or elected by virtue of the constitution of this state, or any law thereof, and no officer, agent or servant of any incorporated city or town, or of any municipal township or school or road district, shall loan out, with or without interest, any money or valuable security received by him, or which may be in his possession or keeping, or over which he may have supervision, care or control, by virtue of his office, agency or service, or under color or pretense thereof; and any such officer, agent or servant so loaning such money or valuable security, on conviction thereof, shall be punished by imprisonment in the penitentiary not less than two years or by fine of not less than five hundred dollars."

However, under this statute, there is case law permitting "loaning" of money deposited in the registry of the court in two instances.

In *State v. Rubey*, 77 Mo. 610 (1883), it was held that a demand deposit in a bank is not a loan as prohibited by Section 558.220, supra. The court, l.c. 620, said that the legislature meant to "discriminate between a deposit in bank for safety and convenience, and an ordinary loan."

In *State ex rel. Ridge v. Shoemaker*, 278 Mo. 138, 212 S.W. 1, an action was brought against the circuit court of Jackson County for interest on a fund deposited in the registry of the court. The fund was deposited as a condition precedent to the relief of specific performance and the clerk merely kept the fund on demand deposit and did not receive any interest on the fund. The court in speaking of Section 558.220, supra, said l.c. S.W.3, that:

"If the parties to said action had desired said funds loaned, pending said litigation, they should have applied to the court for an order authorizing the loaning of same. They were bound to know, as a matter of law, that the clerk, without such authority, was not authorized to loan said fund."

The court also, l.c. S.W.4, cited *State v. Rubey*, supra, in saying the clerk had the right to put funds in a bank on demand deposit.

The Honorable Louise Grant Smith

The clerk, then, prior to the enactment in 1947 of Section 483.310, supra, could "loan" funds only in two instances, by putting the funds in demand deposit for safekeeping, or depositing, investing, or otherwise handling the funds pursuant to a court order. The clerk had no duty to do either, unless ordered by the court, but neither one of these "loanings" waived or diminished the clerk's duty to pay out the funds when ordered to do so by the court.

Then Section 483.310, supra, was enacted authorizing certain circuit clerks to invest funds in savings deposits in certain banks. The applicable part of Section 483.310 reads as follows:

"The circuit clerks in counties of the first class are hereby authorized and empowered to invest funds placed in the registry of the circuit court in savings deposits in banks carrying federal deposit insurance to the extent of the insurance \* \* \*."

The legislature did not say that the circuit clerk shall so invest but permitted the clerk to so invest.

The use of the words "authorized" and "empowered" permitting the clerk to invest is analogous to statutes using the word "may" as opposed to the word "shall". Generally, when the word "shall" is used the statute is mandatory but when "may" is used the statute is permissive. State ex inf. McKittrick v. Wymore, 343 Mo. 98, 119 S.W.2d 941, 944. A statute purely enabling in character, making legal and possible that which otherwise there is no authority to do, and where there are no public interests in private rights involved, will be construed as permissive, and permissive words regarding officers, where a new public obligation is created, will not be construed as mandatory. State ex rel. Harlon v. City of Maplewood, 231 Mo. App. 739, 99 S.W.2d 138, 142. The primary object is to ascertain the intent of the legislature in view of all related statutory provisions and the general objective to be accomplished. Ellis v. Brown, 326 Mo. 627, 33 S.W.2d 104, 107.

It is our opinion that Section 483.310, supra, is such an enabling statute making it legal and possible for the clerk to invest funds for interest in savings deposits without the necessity of a court order. The statute being permissive the clerk can still put money on demand deposit in order to fulfill the duty of paying out the funds when so ordered by the court provided such amounts do not prevent sufficient funds being available on demand. The clerk can

The Honorable Louise Grant Smith

also invest funds other than as provided in Section 483.310, supra, if done pursuant to a court order.

Your second question is whether the provision directing that interest earned on monies invested under Section 483.310, supra, be used for certain county purposes is unconstitutional.

The applicable part of Section 483.310, supra, reads as follows:

"\* \* \* and the income derived therefrom shall be used by the circuit clerk for paying the premiums on bonds of employees of the circuit clerk, rent on safety deposit boxes, printing of pamphlets or booklets of the rules adopted by the circuit court, circuit clerk and forms used in the circuit court which comply with the statutes of the state of Missouri and the rules of the supreme court, copies of which shall be distributed to litigants and members of the bar practicing in said court, and the balance, if any, shall be paid into the general revenue fund of the county."

While it is true that money deposited in court by private parties is not public money but is considered to be held in trust by the circuit clerk and the money deposited along with any interest earned on the money while deposited in court belongs to the prevailing party of the lawsuit or to whomever the court directs should receive it, *Cruce v. Cruce*, 81 Mo. 676; *Bent v. Priest*, 86 Mo. 475; *Bassett v. Kinney*, 24 Conn. 267; *Railroad Co. v. Clark*, 121 Mo. 169, 25 S.W. 192; *Snyder v. Cowan*, supra, we can find no reason why the legislature cannot enact such a statute. We have been directed to no section of the Constitution by which Section 483.310, supra, is on its face unconstitutional.

It is our opinion that the constitutionality of Section 483.310, supra, must be presumed in the absence of court decisions holding otherwise (*State v. Addington*, 12 Mo. App. 214, affirmed 77 Mo. 110).

#### CONCLUSION

It is the opinion of this office that the circuit clerk of a first class county has the discretionary power and authority to invest funds deposited in the registry of the court in the manner provided

The Honorable Louise Grant Smith

for in Section 483.310, RSMo 1959, and to use the income derived therefrom as provided therein.

The foregoing opinion which I hereby approve was prepared by my assistant, Walter W. Nowotny, Jr.

Yours very truly,



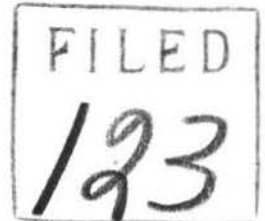
NORMAN H. ANDERSON  
Attorney General

NURSING HOMES:  
NURSING HOME DISTRICTS:  
COUNTY COURT:  
INDIGENTS:

1. Nursing home districts have no authority to accept and admit indigent persons to nursing homes without payment of fees.
2. The nursing home tax under Section 198.250, RSMo Cum. Supp., 1965 may be used for any of the purposes authorized by the nursing home law, Sections 198.200 to 198.350, RSMo Cum. Supp., 1965.

March 28, 1966

OPINION NO. 123



Honorable Paul D. Hess, Jr.  
Prosecuting Attorney  
Macon County Courthouse  
Macon, Missouri

Dear Mr. Hess:

You have requested an official opinion of this office on two questions relating to nursing home districts, as follows:

"1. Under Section 198.300, and any related section, do the directors of a nursing home district have any authority to accept and admit to the nursing home an indigent person without payment of fees?

"2. Under Section 198.250, may a nursing home district use the funds arising from the tax levied, not to exceed 15 cents on the one hundred dollar valuation, for purposes of purchasing nursing home district site, erecting nursing home and related facilities and furnishing the same, building additions to and repairing old buildings, and for the general operation, maintenance and improvement of the nursing home facilities? If such funds from said annual levy may not be used for all of the purposes mentioned, then for which purposes may such funds properly be used?"

In connection to question 1, we enclose a copy of the opinion of the Attorney General No. 243 addressed to Honorable Paul D. Hess, Jr. dated December 4, 1964. It holds that a nursing home district does not have any obligation to admit an indigent person without payment

of fees. As to whether such nursing home district has the authority to admit indigent persons without charge, the enclosed opinion expressly declines to advise, but states:

"We believe that the source of funds for the applicant's payment is immaterial so long as they meet the standard of being reasonable fees as prescribed by the nursing home district, and such fees could be paid by the county court where the indigent applicant resided. In this connection it should be noted that under Section 205.590, RSMo 1959, and other related statutory provisions, the county court has certain duties and obligations in connection with supporting or caring for the indigent residents of their county. Chapter 198, RSMo Cum. Supp. 1963, relating to the formation and operation of nursing home districts, does not create such an obligation on behalf of the nursing home district."

If nursing homes have authority to admit indigents without requiring payment for their care and treatment from any source whatever, such authority must be derived from Section 198.300 RSMo. Cum. Supp. 1965, which sets out the powers of nursing home districts. Such districts, like other public corporations, can exercise only powers granted them by statutes in express words, those necessarily or fairly implied in or incident to powers expressly granted, and those essential or indispensable to declared objects and purposes of public bodies. *Lancaster v. County of Atchison, Mo.*, 180 S.W.2d 706.

Statutory authority of nursing homes bearing on the matter of charges for services is found in Subsections (4) and (7) of said Section 198.300.

"A nursing home district shall have and exercise the following governmental powers, and all other powers incidental, necessary, convenient or desirable to carry out and effectuate the express powers: \* \* \*

"(4) To fix, charge and collect reasonable fees and compensation for the use or occupancy of the nursing home or any part thereof, and for nursing care, medicine, attendance, or other services furnished by the nursing home, according to the rules and regulations prescribed by the board from time to time; \* \* \*

"(7) To maintain the nursing home for the benefit of the inhabitants of the area comprising the district regardless of race, creed or color, and to adopt such reasonable rules and regulations as may



be necessary to render the use of the nursing home of the greatest benefit to the greatest number; to exclude from the use of the nursing home all persons who willfully disregard any of the rules and regulations so established; to extend the privileges and use of the nursing home to persons residing outside the area of the district upon such terms and conditions as the board of directors prescribes by its rules and regulations; \* \* \*

The quoted provisions do not expressly state or fairly imply the authority to admit patients without charge. We conclude that nursing homes have no such authority.

We proceed to your second question, as to the allocation of funds derived from the nursing home tax. Section 198.250 RSMo. Cum. Supp. 1965 provides that a nursing home district shall have the power to levy a property tax not to exceed fifteen cents on the one hundred dollars valuation. Section 198.310, RSMo. Cum. Supp. 1965 provides for borrowing money and issuing bonds for the purpose of "purchasing nursing home district sites, erecting nursing homes and related facilities and furnishing the same, building additions to and repairing old buildings." Under Section 198.300 supra, nursing home districts are empowered to establish, construct, maintain, acquire, develop, expand, extend, improve, operate and manage nursing homes and to enter into contracts necessary to implement these powers and to borrow money and issue securities in order to accomplish its purposes.

No limitation or definition of purpose is set out with respect to the use of the proceeds of the tax mentioned in Section 198.250. The necessary inference is that such funds are to be used to carry out the purposes and powers set out in the nursing home law, Sections 198.200 to 198.350 RSMo Cum. Supp. 1965. Since the expenditure of such funds is not expressly or impliedly limited to any one or more such purposes to the exclusion of others, we think that they may be spent for any and all such purposes and that the mentioned statutory provisions for borrowing money are additional, alternative and cumulative methods of furnishing the financial wherewithal contemplated by the nursing home law.

#### CONCLUSION

It is the opinion of this office that nursing home districts have no authority to accept and admit indigent persons to nursing homes without payment of fees.

It is further the opinion of this office that the nursing home tax under Section 198.250, RSMo. Cum. Supp. may be used by a nursing

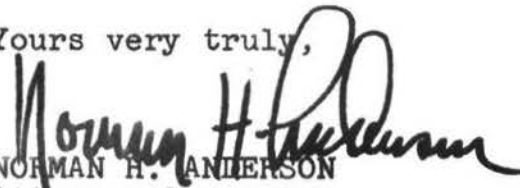
Honorable Paul D. Hess, Jr.

Page 4

home district for any of the purposes authorized by the nursing home law, Sections 198.200 to 198.350, RSMo. Cum. Supp. 1965.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Donald L. Randolph.

Yours very truly,



NORMAN H. ANDERSON  
Attorney General

February 16, 1966



Honorable Don E. Burrell  
Prosecuting Attorney  
Greene County  
Springfield, Missouri 65802

Dear Mr. Burrell:

This office is in receipt of your request for an opinion which request states in part:

"For a considerable time I have been looking for a section of the law which requires hotel and motel operators to keep registration cards or a list of registration of their guests, and which will allow the police and sheriff's office to make an inspection of these lists under the public records section or on some legal ground, but I have been unable to find any section of the statutes which covers this.

"We have several motel and hotel operators in this county who have refused to allow this inspection of their records."

We are also unable to find any statute in this state that requires a hotel or motel operator to keep registration cards or lists or any law that requires guests to register.

It is a well known fact that many establishments do require guests to register. This, perhaps, could be pursuant to a city ordinance.

In the absence of a law, we are not aware of any authority which would authorize officers to inspect records which

Honorable Don E. Burrell

are voluntarily kept by the operator.

Very truly yours,

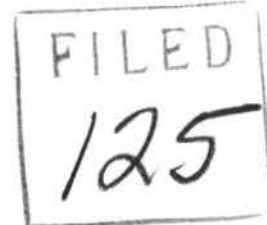
NORMAN H. ANDERSON  
Attorney General

CITY OF ST. LOUIS:  
REGISTRAR:  
COUNTY CLERK:

Sec. 51.150, RSMo Cum. Supp. 1965, applies to the City of St. Louis. The registrar of the City of St. Louis is authorized to perform the duties of County Clerk as provided by Sec. 51.150, supra.

OPINION NO. 125

January 18, 1966



Honorable James C. Kirkpatrick  
Secretary of State  
Capitol Building  
Jefferson City, Missouri

Dear Mr. Kirkpatrick:

This is in answer to your letter of recent date in which you inquired whether House Bill No. 679, 73rd General Assembly, now Section 51.150, RSMo Cum. Supp. 1965, is applicable to the City of St. Louis. In your letter you directed our attention to the language of the above act and that it applies to "County Clerks". You further commented that the City of St. Louis has no city government position by that name.

Section 51.150, RSMo Cum. Supp. 1965, requires county clerks to report to the Secretary of State the salaries and unaccountable fees of elected county officials and various other duties.

An examination of the statutes reveals a pertinent provision. Section 1.080, RSMo 1959, states:

"Whenever the word 'county' is used in any law, general in its character to the whole state, it includes the city of St. Louis, unless such construction is inconsistent with the evident intent of the law, or of some law specially applicable to such city. Whenever the county clerk is authorized or required to perform an act by a law which applies to the city of St. Louis as well as to the counties of the state, the registrar of the city of St. Louis is authorized or required to perform the act insofar as it is to be performed in the city."

The above section specifically directs that the word "county" includes the City of St. Louis, when used in any general law unless:

Honorable James C. Kirkpatrick

(1) Such construction is inconsistent with the evident intent of the law, or,

(2) Such construction is inconsistent with some law specially applicable to such city.

The first matter to be decided is whether Section 51.150, *supra*, is a law "general in its character to the whole state". A statute which relates to persons or things as a class is a general law, while a statute which relates to particular persons or things is a special law. Walters vs. City of St. Louis, 364 Mo. 56, 259 S.W. 2d 377. Section 51.150, *supra*, clearly is a general law relating to county officers as a class and does not relate to any particular member of that class.

The next step in the application of Section 1.080, *supra*, is to determine whether application of Section 51.150, *supra*, is inconsistent with the evident intent of the Act, an element set out in (1) above, again, a reading of the Act indicates no inconsistency if applied to the City of St. Louis. Article VI, Section 31, Missouri Constitution, 1945, recognizes this City to be both a city and county. Section 1.080, *supra*, and Article VI, Section 31, Missouri Constitution, 1945, provide that laws concerning counties shall apply to the City of St. Louis.

The third and last step is to examine Section 51.150, *supra*, to determine whether the Act is inconsistent with a special law, an element of Section 1.080, *supra*, set out in (2) above. The phrase "some law specially applicable to such city" in this section does not mean a special law applicable to the City of St. Louis as distinguished from a general law applicable to the state, but means some law specially applicable to the city in its corporate capacity. State v. Dwyer, 343 Mo. 973, 124 S.W. 2d 1173. While Section 1.080, *supra*, was amended after the Dwyer case, *supra*, the holding generally stated above is still applicable. It does not appear that there is any such special law applicable to the city in its corporate capacity that would be inconsistent with the provision of Section 51.150, *supra*.

The registrar of the City of St. Louis is authorized to perform the function of the County Clerk, when such are required by law and are applicable to said City, by Section 1.080, *supra*.



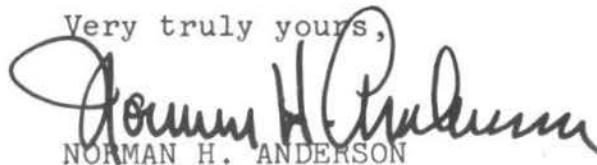
Honorable James C. Kirkpatrick

CONCLUSION

It is therefore the opinion of this office that Section 51.150, RSMo Cum. Supp. 1965, is applicable to the City of St. Louis; and that the registrar of the City of St. Louis is authorized to perform the duties of the County Clerk as set out in Section 51.150, supra.

The foregoing opinion, which I hereby approve, was prepared by my assistant, William A. Peterson.

Very truly yours,

  
NORMAN H. ANDERSON  
Attorney General

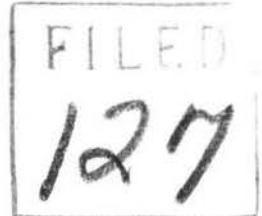
COUNTY AUDITOR: The office of county auditor in Cape Girardeau County will not exist until January 1, 1967. The Governor may make an appointment after that date to fill the vacancy.

*Opinion 143-1967 (ltr)  
should always be  
attached to this opinion  
when a copy is sent out.*

OPINION NO. 127

March 21, 1966

Honorable Bill D. Burlison  
Prosecuting Attorney for Cape Girardeau County  
708 Broadway  
Cape Girardeau, Missouri 63701



Dear Mr. Burlison:

Reference is made to your request for an official opinion of this department, reading as follows:

"The County of Cape Girardeau is expected to become Second Class effective January 1, 1967. Assuming this to be so, should a county auditor be elected in 1966 to take office January 1, 1967?

"If it is not proper to elect an auditor in 1966, should he be elected in 1967, or would the governor make an appointment in 1967? Or would there be some other disposition of the problem?

"This apparently requires an interpretation of Section 55.050, Missouri Revised Statutes - 1959."

In your letter you state that Cape Girardeau County, Missouri, is expected to become a second class county on January 1, 1967.

Enclosed herewith is an opinion issued by this office on December 22, 1964, in which it is ruled that the office of county auditor in a second class county is automatically created under Section 55.040, VAMS, on the day the county becomes a second class county and that the office becomes vacant on that date. This opinion further holds that on or after that date the Governor may appoint an auditor to fill such vacancy to serve until the end of the term.

You inquire whether a person may be elected in 1966, to assume the duties of auditor on January 1, 1967. In State ex rel Berry v. McGrath, 64 Mo. 139, a judge of a circuit court tendered his resignation to become effective at a later date. The question

Honorable Bill D. Burlison

was whether a person could be elected circuit judge prior to the effective date of resignation. The court held that a person could not be elected to an office before the office became vacant.

In State v. Kiburz, 208 S.W. 2d 285, the court held that when a new office is created a vacancy arises ipso facto, Section 55.050, RSMo 1959, provides for the filling of a vacancy in the office by an appointment by the Governor.

According to the information submitted Cape Girardeau County will not become a second class county until January 1, 1967. The office of county auditor in Cape Girardeau County will not exist until the county becomes a second class county. There is no office or vacancy to be filled until the office is in existence. There is no basis or reason for holding an election to elect a person to an office until the office exists. Therefore, a person cannot be legally elected as county auditor of Cape Girardeau County until January 1, 1967.

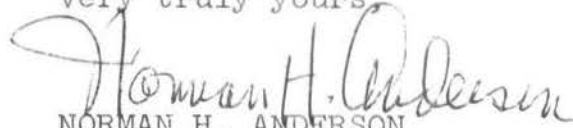
#### CONCLUSION

It is the opinion of this office:

- (1) That until Cape Girardeau County becomes a second class county there is no office of county auditor in said county.
- (2) That a person cannot be elected to the office of county auditor until the office is in existence.
- (3) That after the vacancy in the office is filled by the appointment of the Governor such appointee holds the office until the next general election as provided by Section 55.050, RSMo 1959.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Moody Mansur.

Very truly yours,

  
NORMAN H. ANDERSON  
Attorney General

Enclosure:

Opinion No. 394 (1964)

Op. # 129

OPINION No. 129  
Answered by Letter (General  
Anderson)

June 22, 1966



The Honorable Warren E. Hearnes  
Governor of Missouri  
Executive Office  
Jefferson City

Dear Governor:

This letter is in response to certain questions set out in a previous letter from you in regard to participation by the State of Missouri in the activities of the River Basin Commission which may now be established under the provisions of P. L. 89-80, titled "The Water Resources Planning Act".

I apologize for the delay in furnishing you with this information. However, the matter was up for review on three different occasions because of differences of opinions of those doing the research.

The following are the answers to the questions set out in your letter:

- 1) It is the opinion of this office that the so-called River Basin Commission is an agency of the Federal Government and under Article 3, Section 38a of the Constitution and under Section 256.200 (5) the Water Resources Board may cooperate with that agency, provided those proposals are within the scope of Section 256.180 to 252.260 RSMo Cum. Supp. 1965. We are able to find no power that authorizes the Governor to so cooperate.
- 2) It is the opinion of this office that neither the Governor nor the Board has been given authority by the Legislature to express concurrence or non-concurrence in the establishment of the River Basin Commission.

XERO  
COPY

XERO  
COPY

XERO  
COPY

XERO  
COPY

Governor Hearnes  
Page 2  
June 22, 1966

- 3) This office entertains considerable doubt that the State of Missouri can participate in the River Basin Commission activities without express authorization by statute. Certainly this is absolutely necessary in order for the State of Missouri to contribute funds to the Commission. It is the opinion of this office that there must be express authorization and appropriation for that purpose.

Respecting your reference as set out in your letter, of Section 26.130, it seems that this has reference to a different law of Congress even though it is in the same general area. This office does not believe that this Statute could be considered as giving you the authority granted in Section 26.130 to cooperate with respect to Public Law 89-80.

With respect to your reference to Article III, Section 39, paragraph 4 which provides that the General Assembly shall not have power "to pay or authorize payment of any claim against the State or any County or any Municipal Corporation of the State under any agreement or contract made without express authority of law;", it appears that this does constitute a prohibition against the State spending money in connection with its participation in the River Basin Commission, unless and until the Legislature has specifically acted upon it.

You ask whether or not a formal opinion should be requested on this subject. You also request that a copy of our reply be forwarded to the Water Resources Board.

I believe that you would be interested in reviewing our tentative and anticipated answers as set out in this letter before deciding whether or not a formal opinion should be issued to you by this office. I will also await the forwarding of a copy of this reply to the Water Resources Board until you so authorize it.

I shall await your decision in this matter. For your information a formal opinion has been drafted and can be immediately forwarded upon your request.

Respectfully,

NORMAN H. ANDERSON  
Attorney General

NHA/hw

XERO  
COPY

XERO  
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JUVENILE OFFICERS:  
JUVENILE COURTS:  
COUNTIES:

The phrase, "engaged full time" as used in Section 211.393, RSMo. Supp. 1965, means that the juvenile officer, in order to qualify for the statutory contribution by the State of Missouri, may not hold another office or position and may not engage in any activity which would impair his ability to faithfully perform his duties as juvenile officer. Under this section it is only the juvenile officer who may qualify for the payments by the State of Missouri.

OPINION NO. 130

March 22, 1966

Honorable Charles H. Sloan  
Prosecuting Attorney  
Ray County  
Richmond, Missouri



Dear Mr. Sloan:

This is in response to your opinion request in which you pose the following questions relative to the compensation of juvenile officers under the provisions of Section 211.393, RSMo. Supp. 1965:

- "1. Does the phrase 'engaged full time' mean that the juvenile officer has no other office or occupation and requires him to spend all of his time as a juvenile officer?
- "2. In circuits serving two counties, if the juvenile officer is assigned to one county and the deputy juvenile officer assigned to the other county, could the State of Missouri pay one half of each of their salaries?"

Section 211.393, states as follows:

"1. The salaries and expenses of all juvenile court personnel in counties of the first and second class and the city of St. Louis are payable monthly out of county or city funds as the case may be, except that one-half of the salary of the juvenile officer of any circuit in which he is engaged full time, is payable by the state of



Honorable Charles H. Sloan

Missouri, but not to exceed the sum of four thousand two hundred and fifty dollars annually.

"2. In counties of the third and fourth class, the salaries and expenses of juvenile court personnel are payable monthly out of the county funds except that in circuits serving two or more counties of the second and third class or third and fourth class which comprise one or more judicial circuits, the salaries and expenses are payable out of the county funds and prorated among the several counties served upon a ratio determined by a comparison of the respective populations of the counties involved, except that one-half of the salary of the juvenile officer of any circuit in which he is engaged full time, is payable monthly by the state of Missouri, but not to exceed the sum of four thousand two hundred and fifty dollars annually."  
[Emphasis added.]

The statute authorizes the State of Missouri to pay one-half of the salary of the juvenile officer of any circuit in which he is engaged full time, but not in excess of the sum of \$4,250 annually.

In answer to your first question requesting an interpretation of the language "full time," we think that these words must be considered in their ordinary meaning.

In this respect we note that Webster's New International Dictionary, 2nd Edition (1963), at page 919, defines "full time" as "the amount of time considered the normal or standard amount for working during a given period (as a day, a week or a month)." In *Cote v. Bachelder-Worcester Company*, 160 A. 101, 85 N.H. 444, in considering the meaning of "full time" in an industrial community the court at 1.c. 102 stated:

" \* \* \* Full time ordinarily signifies the normal or customary period of labor per day or per week in the establishment where the workman is employed for the kind of work which he is hired to perform. 'One who works only part of a day or only two or three days out of a week, or only a few weeks out of the year, cannot be said to

Honorable Charles H. Sloan

be working at full time.' Beaver Dam Co.  
v. Hocker, 202 Ky. 398, 259 S.W. 1010, 1011.

"Words in a statute are to be construed according to the common and approved usage of the language unless they have acquired a peculiar and appropriate meaning in the law.' Colston v. Railroad, 78 N.H. 284, 286, 99 A. 649; \* \* \*"

In Johnson v. Stoughton Wagon Company, 95 N.W. 394, 118 Wisconsin 438 (1903), the court considered the meaning of 'full time' in reference to the officer of a corporation and stated as follows at l.c. 397:

" \* \* \* Of course, an agreement 'to give his full time to the company's service' is, in its nature, ambiguous. It certainly does not require 24 hours a day of an employee's time, nor indeed, every moment of his working hours. Mobile, etc., R. Co., v. Owens, 121 Ala. 505, 25 South. 612. On the other hand, it undoubtedly does require that he shall make that employment his business, to the exclusion of the conduct of another business such as usually calls for the substantial part of a manager's time or attention. We cannot think, however, that the business man who undertakes to make the affairs of a corporation or of a firm his business, and to give to it his full time, absolutely excludes himself from everything else. \* \* \*"

We conclude, therefore, in answer to your first question that the phrase "engaged full time" means that the juvenile officer, in order to qualify for the statutory payment by the State of Missouri, must give his position his complete and undivided attention and may not engage in any other activities that would either consume any of the portion of the time required for him to properly function as a juvenile officer or which would in any respect interfere with his ability to perform his duties. This would necessarily mean that such a juvenile officer would not be "engaged full time" if he at the same time attempted to occupy or hold any other position or engage in any activity such as to interfere in any manner with his duties as a juvenile officer. However, we do not believe that "full time" means that such officer is absolutely restricted from any other endeavor, but to the extent that such other activity either constitutes another position or is such as to impair his capacity, devotion or time required and customary for the full performance of the occupation of juvenile officer.

Honorable Charles H. Sloan

We are enclosing an official opinion rendered by the Attorney General under date of August 12, 1957, to Thomas Eagleton, Circuit Attorney of St. Louis City, which we believe to be applicable. Such opinion holds that the employment of a person part time is not lawful under a statute requiring the person employed to devote his entire time to the discharge of the duties of his office.

In response to your second question, the language of the statute is quite clear. The statute refers only to "the juvenile officer" and does not permit any contribution by the State of Missouri to the deputy juvenile officer regardless of his area of assignment. The term "juvenile officer" is limited to that specific position and cannot be extended to include any subordinate officers. Inasmuch as the statute contains no ambiguity, the juvenile officer, himself, is the only person who may qualify for the statutory contribution.

#### CONCLUSION

It is therefore the opinion of this office that the phrase "engaged full time" as used in Section 211.393, RSMo. Supp. 1965, means that the juvenile officer, in order to qualify for the statutory contribution by the State of Missouri, may not hold another office or position and may not engage in any activity which would impair his ability to faithfully perform his duties as juvenile officer. Under this section it is only the juvenile officer who may qualify for the payments by the State of Missouri.

The foregoing opinion which I hereby approve was prepared by my assistant, John C. Klaffenbach.

Yours very truly,

NORMAN H. ANDERSON  
Attorney General

Enclosure:  
Opinion No. 26, Eagleton, 8-12-57

COUNTY COURTS:  
CITIES, TOWNS AND VILLAGES:  
ROADS:  
STREETS:

A county court may expend monies from its Class 6 funds on streets of cities, towns and villages only when they are properly designated county roads and form a part of a continuous road or highway of said county leading into or through such city, town or village.

AMENDED OPINION NO. 131

May 26, 1966

Honorable Don Witt  
Prosecuting Attorney  
Platte County  
Platte City, Missouri



Dear Mr. Witt:

This opinion is in response to your inquiry concerning the right of a county court to expend county revenues from the general county levy on city streets within the county.

As you stated in your letter, we must assume that the other requisites of the statutes have been met.

The question is generated by the wording of subsection 6, of Section 50.680, RSMo Supp. 1965 (as it presently reads), which is set out below:

"Class 6. After having provided for the five classes of expenses heretofore specified, the county court may expend any balance for any lawful purpose; provided, however, that the county court shall not incur any expense under class six unless there is actually on hand in cash funds sufficient to pay all claims provided for in preceding classes together with any expense incurred under class six; provided, that if there be outstanding warrants constituting legal obligations such warrants shall first be paid before any expenditure is authorized under class six."

Revenue derived from taxes imposed for general revenue purposes by counties under Section 137.035, RSMo 1959, is the source of the funds in question. The question involves a determination whether the use of funds as detailed in your letter is a "lawful



Honorable Don Witt -

purpose" contemplated by Class 6, of Section 50.680 (supra).

We believe it to be accepted law in this state that the powers and authority of county courts are limited to their constitutional and statutory grants. Any acts outside of or beyond their authority are void. The Missouri Supreme Court in Lancaster v. County of Atchison, 180 S.W.2d 706, 708, expressed their views in the following words:

"[1] 'The county courts are not the general agents of the counties or of the state. Their powers are limited and defined by law. These statutes constitute their warrant of attorney. Whenever they step outside of and beyond this statutory authority their acts are void.' Sturgeon v. Hampton, 88 Mo. 203, loc.cit.213. Quoted with approval in the case of Morris et al. v. Karr et al., 342 Mo. 179, 114 S.W.2d 962, loc. cit. 964.

"[2,3] Both parties to this suit agree that counties, like other public corporations, 'can exercise the following powers and no others: (1) those granted in express words; (2) those necessarily or fairly implied in or incident to the powers expressly granted; (3) those essential to the declared objects and purposes of the corporation--not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation and the power is denied.' Dillon on Municipal Corporations, 3rd Ed., Section 89. We have repeatedly approved this quotation. See State ex rel. City of Blue Springs v. McWilliams et al., 335 Mo. 816, 74 S.W.2d 363; State ex rel. City of Hannibal v. Smith, State Auditor, 335 Mo. 825, 74 S.W.2d 367, 372."

See also, St. Francois Co. v. Brookshire, 302 S.W.2d 1; State ex rel. Floyd v. Philpot, 266 S.W.2d 704.

We can find statutory authority for the continuous road concept or use of county funds on certain streets in cities, towns and villages in section 108.120, RSMo 1959 (State ex rel. Clay Co. v. Hackmann, 195 S.W. 706, 709, Kroeger v. St. Louis County, 218 S.W.2d 118, 120).

Honorable Don Witt

However, we find no authority for expenditure of county funds on "city streets," not part of the county highway system. We have held that a county court cannot establish a city street not part of a county road system. See enclosed Opinion of the Attorney General, No. 253, dated September 22, 1965, addressed to Honorable James G. Lauderdale.

Nor have we found any statutory authority for the county court to "donate" monies to a city within its boundaries for the repair of such streets of the city not part of a continuous road system.

We conclude the term "lawful purpose" as used in Section 50.680, RSMo Supp. 1965, means as authorized by the Constitution of Missouri and by statutes and unless some authority for the expenditure of funds can be found, such expenditure on city streets would not be for a lawful purpose.

Inasmuch as you state in your letter that the court is familiar with the provisions of Section 137.555 through 137.557, RSMo Supp. 1965, and that you inquire only as to additional methods by which money of the county can be granted to the city, we will not discuss these statutes.

We have used the term "county road system." By that term, we mean all county roads and such streets, roads or alleys of any city, town or village, which are properly designated county roads and shall form a part of a continuous road or highway of said county leading into or through such city, town or village.

We note, in passing, that there may be circumstances in which, under the statutes, a county has an obligation to a city, town or village, for paving, guttering, sidewalks, etc., as may be spelled out by a particular statute. Thus, a county may be obligated to a city or town organized under a special charter pursuant to Section 88.790, RSMo 1959, for the county's proportionate share of such costs of paving, macadamizing, curbing, guttering, sidewalks, etc. Similarly, a county would be obligated to a third class city under Section 88.510, RSMo 1959, for such public works. A county would be obligated to a fourth class city under Section 88.743, RSMo 1959. In the same fashion, see Section 88.333, RSMo 1959, as to first class cities; Section 88.657, RSMo 1959, as to "third class and certain special charter cities;" Section 88.900, RSMo 1959, as to cities of 30,000 or less; and Section 88.420, RSMo 1959, as to cities of the second class.



Honorable Don Witt

CONCLUSION

It is the opinion of this office that:

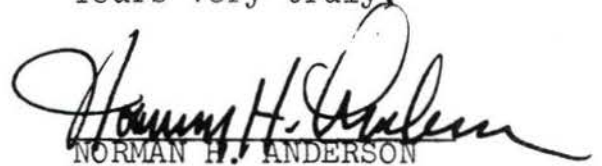
1. The County Court of Platte County may lawfully expend county monies derived from the general revenue tax on city streets where such city streets form a part of a continuous county road system.

2. A county court may not donate county monies to a city for repair of its streets where such streets do not form a part of a continuous road system.

3. A county may become legally obligated for its proportionate share of the costs of specified improvements adjacent to county property as provided by statute where a city paves or improves streets, sidewalks, etc.

The foregoing amended opinion, which I hereby approve, was prepared by my assistant Richard C. Ashby.

Yours very truly,

  
NORMAN H. ANDERSON  
Attorney General

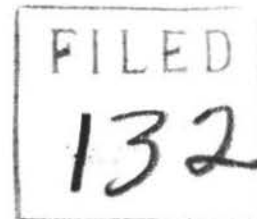
Enclosure: Opinion No. 253,  
9-22-65, James G.  
Lauderdale.

LIQUORS: It is unlawful under Section 311.070, RSMo 1959, for the Anheuser-Busch Employees Association to operate a package liquor store and a tavern for on-premise consumption for 5% beer and intoxicating liquor.

OPINION NO. 132

February 16, 1966

Honorable Glennon T. Moran, Supervisor  
Department of Liquor Control  
State of Missouri  
Jefferson City, Missouri 65102



Dear Mr. Moran:

This is in answer to your request for an opinion on the question of whether it is unlawful for the Anheuser-Busch Employees Association to operate a package liquor store and a tavern for on-premise consumption of 5% beer and intoxicating liquor.

You have informed us that the Association's membership is composed entirely of employees of Anheuser-Busch, Inc., a licensed brewer, but that the Association has no other connection with the brewery. Also the Association's membership does not contain any officers or directors of the brewery and the business secretary of the Association is not an employee of the brewery.

Subsection 1 of Section 311.070, RSMo 1959, reads as follows:

"Distillers, wholesalers, wine makers, brewers or their employees, officers or agents, shall not, under any circumstances, directly or indirectly, have any financial interest in the retail business for sale of intoxicating liquors, and shall not, directly or indirectly, loan, give away or furnish equipment, money, credit or property of any kind, except ordinary commercial credit for liquors sold to such retail dealers."

In construing statutes the basic rule is to seek the intention of the legislature. Intent should be ascertained

Honorable Glennon T. Moran, Supervisor


from the words used giving these words their usual and ordinary meaning. *Marty v. State Tax Commission of Mo.*, Mo, 336 SW2d 696 [1,2]. The legislature in plain, direct language says that employees of a brewery shall not, under any circumstances, directly or indirectly have any financial interest in the retail liquor business. In the instant situation the employees, through their association, would, by opening such tavern and liquor store, have a prohibited financial interest in the retail liquor business.

CONCLUSION

It is the opinion of this office that it is unlawful under Section 311.070, RSMo 1959, for the Anheuser-Busch Employees Association to operate a package liquor store and a tavern for on-premise consumption for 5% beer and intoxicating liquor.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Walter W. Nowotny, Jr.

Very truly yours,

  
NORMAN H. ANDERSON  
Attorney General

PARKS:  
DAMS:  
RESERVOIR:  
COUNTY PARKS:  
COUNTIES:  
RECREATION GROUNDS:

Clay County cannot spend its funds for the improvement of a reservoir located in Clinton County until such time as Clay County and Clinton County adopt a plan to cooperate under the authority of Sections 64.750 and 64.780 Cum. Supp. 1965, and said two counties may then properly develop the projects of their natural resources for the mutual benefit of the people of each county.

OPINION NO. 133

Honorable Gerald Kiser  
Clay County Prosecuting Attorney  
Liberty, Missouri

December 6, 1966



Dear Mr. Kiser:

Your letter of January 13, 1966, requesting an opinion of this office is as follows:

"I have been asked by the Clay County Park and Recreation Planning Commission for an opinion regarding the use of Clay County Funds in any other area outside of Clay County.

"This question concerns the proposed dam and reservoir at Smithville (Clay County), Missouri. This reservoir will back up into Clinton County. At the present time, Clinton County does not have a park commission, and therefore has no monies available for the purpose of developing recreation areas adjacent to that part of the reservoir in Clinton County.

"The Clay County Park and Recreation Planning Commission has asked me to obtain an opinion from you relating to the legality of spending Clay County Funds in Clinton County, for this purpose."



Section 64.755 Cum. Supp. 1965, provides that political subdivisions may establish a system of public recreation and that they may create such a system jointly with other counties.

In substance, Section 64.755, supra, provides that county courts may provide for parks and recreation centers and that funds may be set up in their respective budgets by the county courts, and this section further defines the powers of such counties in connection with such a program.

Honorable Gerald Kiser

Section 64.760 provides for a joint operation of a recreation system. This section is as follows:

"Any two or more governing bodies may establish and conduct jointly a system of public recreation and may exercise all the powers authorized by sections 64.750 to 64.780. The respective governing bodies administering programs jointly may provide by agreement among themselves for all matters connected with the programs and determine what items of cost and expense shall be paid by each."

Section 64.755 (supra) grants to a governing body of a political subdivision the broadest possible power to establish, equip, develop, operate, maintain and conduct a system of public recreation including parks and other recreational grounds.

This section indicates that a county court has the broadest possible power, for the reason that it contains no limitation on the establishment and maintenance of such recreation facilities within the limits of the county or political subdivision.

However, the following section, Section 64.760, expressly authorizes two or more governing bodies of political subdivision to establish, and conduct jointly, a system of public recreation. It provides for an agreement between the governing bodies administering the program jointly, to determine what items of cost and expense shall be paid by each.

The power delegated to political subdivisions by these two sections is actually unnecessary in the light of Section 70.220, RSMo 1959, which section provides for the cooperation of political subdivisions to contract and cooperate in the planning development and operation of public improvements.

Therefore, we must assume that the Legislature, when it enacted Section 64.760, meant to imply that the powers granted to a county by Section 64.755 were limited.

In other words Section 64.760, when applied to counties, impliedly limits counties from spending county funds outside of the county limits, unless they cooperate with an adjoining county in the manner prescribed in Section 64.760.

It is to be seen by a reading of Sections 64.750 to 64.780 that Clay County and Clinton County may cooperate in the establishment of a recreation center, provided they proceed as outlined in these statutes.

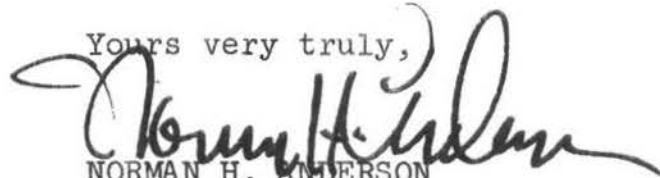
Honorable Gerald Kiser

CONCLUSION

It is therefore the opinion of this office that Clay County, cannot spend its funds for the improvement of a reservoir located in Clinton County until such time as Clay County and Clinton County adopt a plan to cooperate under the authority of Sections 64.750 and 64.780, Cum. Supp. 1965, and said two counties may then properly develop the projects of their natural resources for the mutual benefit of the people of each county.

The foregoing opinion which I hereby approve was prepared by my assistant, O. Hampton Stevens.

Yours very truly,

A handwritten signature in dark ink, appearing to read "Norman H. Anderson", written in a cursive style.

NORMAN H. ANDERSON  
Attorney General



COUNTY BOARDS OF EDUCATION: 1. Where county court district  
SCHOOLS: boundaries are changed by the  
REAPPORTIONMENT: county court a county board of  
education member who as a result  
of the changed boundaries no  
longer resides in the county court  
district from which he elected is not disqualified as a member  
of the board but may continue to serve until the expiration of  
his term. 2. At the next county board of education election  
subsequent to the change of county court district boundaries,  
the expiring positions should be filled by one member elected  
from each county court district as these districts exist at  
the time of the election.

OPINION NO. 137

May 23, 1966

Honorable Bill D. Burlison  
Prosecuting Attorney  
Cape Girardeau County  
708 Broadway  
Cape Girardeau, Missouri 63701



Dear Mr. Burlison:

This official opinion is issued in response to your request of January 18, 1966.

Your letter states that Cape Girardeau County has a properly elected board of education pursuant to Section 162.111, RSMo. Supp. 1965. Further, your letter states that since the last school election the county court has redetermined the boundaries of the county court districts; that as a result of this change in the districts only one county board of education member resides in the new District 2, and the five remaining members now reside in the new District No. 1; that the two board members whose terms expire this year live in the new District No. 1.

You request an official ruling on the following two questions:

"1. Is the board legally constituted? If not, what is required?

"2. At the next school election must both members elected come from District #2. If not, what should the distribution be?"

Honorable Bill D. Burlison

As to your first question: Section 162.111(2), provides that not more than three of the six members of a county board of education shall be elected from one county court district.

We assume, since you did not state to the contrary, that when the present members of the county board of education were elected there were three elected from each of the then existing county court districts. The requirement of Section 162.111 applies to the residence of the county board members at the time of their election. Since this requirement was met at the time the present board members were elected, we are of the opinion that subsequent change in the residence would not, under this section, affect the validity of their election.

Section 162.141, RSMo. Supp. 1965, provides:

"Any member of the county board . . .  
who changes his residence to another  
county court district shall be dis-  
qualified as a member of the board. \* \* \*"

This office has previously issued an official ruling on the meaning of Section 165.667, RSMo 1959, which was the statutory predecessor to the present Section 162.141, RSMo. Supp. 1965. This opinion held that the disqualification for change of residence provision would not apply to a board member who because of a reorganization of school districts was placed in a school district with another county board member. (The statute at that time provided disqualification of a member who changed his residence either to another county court district or to another municipal township or school district in which another member of the board resided). The opinion ruled that the disqualification provisions must be strictly construed and that where the board member did not move his residence but the district boundaries were changed around him, such a board member was not disqualified and could continue to serve for the remainder of his term (Opinion No. 59, McGhee, 2-19-60, copy enclosed).

Therefore, as to your first question, we are of the opinion that a change of the county court district boundaries by the county court does not work a disqualification of county board members, and the present members may continue in office until the expiration of their term.

As to your second question: After the first election, county board of education members are elected to serve for three-year terms. At each annual school election two members, one from each county court district, are to be elected. Section

Honorable Bill D. Burlison

162.111. At the next school election, subsequent to the change of the county court districts, two members terms will expire. At that time two new members should be elected. One member should be elected from each of the presently existing county court districts. The remaining four members of the board whose terms have not expired will continue in office as we have indicated in our answer to your first question.

Subsequent county board of education elections should of course be from the then existing districts.

Therefore, at the next election of county board of education members subsequent to a change in county court district boundaries, there should be elected one member from each of the county court districts as they exist at the time of that election.

#### CONCLUSION

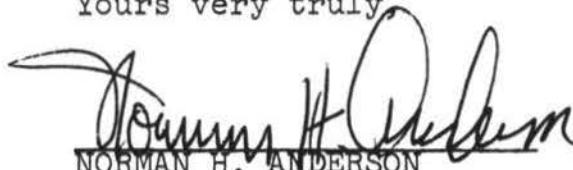
Therefore, it is the opinion of this office that:

1. Where county court district boundaries are changed by the county court, a county board of education member who as a result of the changed boundaries no longer resides in the county court district from which he was elected is not disqualified as a member of the board but may continue to serve until the expiration of his term;

2. At the next county board of education election subsequent to the change of county court district boundaries, the expiring positions should be filled by one member elected from each county court district as these districts exist at the time of the election.

The foregoing opinion, which I hereby approve, was prepared by my assistant Louis C. DeFeo, Jr.

Yours very truly,

  
NORMAN H. ANDERSON  
Attorney General

Enclosure: Opinion No. 59,  
McGhee, 2-19-61.

SCHOOL BONDS:  
BOARD OF REGENTS:  
BOARD OF TRUSTEES:  
JUNIOR COLLEGES:  
SENIOR COLLEGES:

Under the current statutes, there have been two independent boards created to govern the Jasper County Junior College and if organized, the Missouri Southern State College at Joplin, Mo. Each Board has defined statutory duties. The Board of Trustees is the proper agency to call an election; and where approved by popular vote, to issue bonds, to sell the bonds as obligations of the Junior College District and to levy taxes pay the principal and interest thereon.

February 25, 1966

OPINION NO. 139

Mr. Herbert Van Fleet  
Counsel, Board of Regents  
Jasper County Junior College District  
c/o Seiler, Blanchards & Van Fleet  
Fifth and Pearl  
Joplin, Missouri



Dear Mr. Van Fleet:

This opinion is in response to your inquiry whether it is the Board of Regents or the Board of Trustees of the Jasper County Junior College District which has the power to and should now issue the bonds authorized by the voters of the Junior College District on May 7, 1965, for the Jasper County Junior College program.

We assume that the Junior College District was organized pursuant to Sections 1 through 12 of the Laws, 1961, page 357 (S.C.S.S.B. 7) as amended and now found codified as Sections 178.770 through 178.890, RSMo Cum. Supp. 1965.

The bond proposal submitted to the voters on May 7, 1965, provided that the funds were to be used in summary to equip, to repair and/or build facilities for the Jasper County Junior College according to the transcript on the Jasper County Junior College District bond issue which you furnished this office.

The pertinent statutes relating to the Missouri Southern State College as set out in the RSMo Cum. Supp 1965, are as follows:

"174.230. 1. Other provisions of law notwithstanding, if the facilities of the present Jasper County junior college districts are made available, there shall be established in Jasper County, Missouri, a state college, which shall make available those third and fourth year college level courses that lead to a baccalaureate degree.

2. This state college shall in the year 1967, or at such a time as the present Jasper County junior college district has acquired a campus for a third and fourth year college which meets the requirements established by the board of curators of Missouri University and its enrollment trends constitute sufficient justification for the operation of a four year college in the opinion of the board, whichever occurs later, become an independent two year state senior college, to be known as the 'Missouri Southern State College'. Its district shall be coterminous with that of the Jasper county junior college district."

"174.240. 1. The governor shall appoint, prior to January 1, 1966, by and with the advice and consent of the senate, a five member board of regents which shall be responsible for the administration of the Missouri southern state college and the Jasper county junior college district, including those powers and duties of the board of trustees of the junior college district under the provisions of section 178.860, RSMo. The board of regents shall consist of five members appointed by the governor for terms of five years except that of the members first appointed, one shall be appointed for a term of one year, one for a term of two years, one for a term of three years, one for a term of four years and one for a term of five years. Not more than three members shall be associated with any one political party and all of the members shall be residents of the college district."

(Emphasis added)

For ease in reading, we insert Section 178.860, RSMo Cum. Supp. 1965, relating to Junior College Districts:



"The board of trustees shall appoint the employees of the junior college, define and assign their powers and duties and fix their compensation. All certified personnel shall be members of the public school retirement system of Missouri under provisions of section 169.010, RSMo."

Subsection 2 of Section 174.240 (supra) provides:

"2. The state shall provide the funds necessary to provide the staff for and operation of the state senior college. The board of trustees of the junior college district shall levy a tax within the district, as provided in sections 178.770 to 178.890, RSMo, which, together with state aid provided for junior colleges and funds available from any other sources, will be sufficient to pay the costs of the operation of the junior college and the costs of any capital improvements for both the junior and senior college." (Emphasis added)

Section 178.770:

"1. In any public school district, or in any two or more contiguous public school districts in this state, whether in the same county or not, the voters resident therein may organize a junior college district in the manner hereinafter provided. Prior to the organization of a district under sections 178.770 to 178.890, the state board of education shall establish standards for the organization of the districts which shall include among other things:

\* \* \* \* \*

2. When a district is organized, it shall be a body corporate and a subdivision of the state of Missouri and shall be known as 'The Junior College District of \_\_\_\_\_, Missouri' and, in that name, may sue and be sued, levy and collect taxes within the limitations of sections 178.770 to 178.890, issue bonds and possess the same corporate powers as common and six-director



school districts in this state, other than urban districts, except as herein otherwise provided. (L. 1963 p. 200 §13-77) Effective 7-1-65 (Source: L. 1961 p. 457 §1)."

Inasmuch as the above laws (Sections 174.230 - 174.240, RSMo Cum. Supp. 1965 relating to Missouri Southern State College) were enacted during the last session of the legislature, we have not been able to find any judicial decisions on this point. We must construe these statutes and seek to harmonize these provisions so as to arrive at the intent of the legislature. (Julian v. Mayor, et al, 391 SW 2d 864; May Department Stores v. Weinstein, 395 SW 2d 525). In construing these statutes, the words of the statute should be given their plain and ordinary meaning to promote the object and purpose of the statute (Julian v. Mayor, et al; May Department Stores v. Weinstein (supra). Even though the statutes may be found in different chapters and enacted at different times, these statutes do relate to the same subject matter and must be construed together (State ex rel Smithco Transport Company v. Public Service Commission, 316 SW 2d 6, 1.c. 13).

With these general principles in mind, we believe under Section 174.240, supra, the statute clearly contemplates two independent boards for the Jasper County Junior College District with each having clearly defined areas of jurisdiction to govern the existing Junior College.

The underscored portions of Section 174.240, supra, clearly spells out the existence of two independent boards, (The Board of Regents and The Board of Trustees). The administration of the present Junior College (under Subsection 1 of Section 174.240 supra) and those functions spelled out in Section 178.860, supra, are assigned to the Board of Regents. The authority to call a bond election, issue bonds when approved and tax to pay the principal and interest thereon for the operation of the Junior College under Subsection 2 of Section 174.240 is assigned to The Board of Trustees of the Junior College District. Under Subsection 2 of Section 178.770, the Junior College District has the power to "levy and collect taxes within the limitations of Section 178.770 to 178.890, issue bonds and possess the same corporate powers as common and six-director school districts

in this state, other than urban districts, except as herein otherwise provided." Section 164.121, RSMo Cum. Supp. 1965, applicable to six-director school districts other than urban districts, expressly provides that the Board of Trustees shall exercise these powers. Applying the doctrine that when a statute prescribes a particular thing upon which it is to operate, all other things not expressly mentioned are excluded from its operation, we conclude the fiscal powers stated above in Sections 174.240 and 178.770, are vested solely in the Board of Trustees. (Kansas City Terminal Railway Company v. Kansas City Transit Inc., 350 SW 2d 828, 831, Transferred 359 SW 2d 698, cert den. 83 Supreme Court 551, 371 U.S. 968, 9 L. Ed 2d 539; Parvey v. Humane Society of Missouri 343 SW 2d 678, 681.)

We conclude that the Board of Regents now has the responsibility for the "administration" expressly delegated by Sub-section 1 of Section 174.240, supra, as well as the authority found in Section 178.860, supra, over the present Jasper County Junior College and when organized, will exercise the same authority over the Missouri Southern State College.

We thus conclude that the Board of Trustees of the Junior College District was authorized to call an election in the Junior College District for the purpose of submitting a proposition to issue bonds of the Junior College District; and, as the voters authorized the bond issue, the Board of Trustees of the Jasper County Junior College District now has the power to authorize the issuance of the bonds; to cause the bonds to be executed by the Board of Trustees; to sell the bonds as the obligation of the Junior College District; and to levy taxes on the taxable, tangible property situated in the Junior College District for the purpose of paying the principal and interest thereon.

#### CONCLUSION

It is the opinion of this office that:


1. The provisions of Sections 174.230 and 174.240, RSMo Cum. Supp 1965, provide for two boards to be known as the Board of Regents and the Board of Trustees to govern the Jasper County Junior College District.

2. The Board of Trustees exercises the fiscal powers denominated in Subsection 2 of Section 174.240 and Section 178.770 RSMo Cum. Supp. 1965, over the Jasper County Junior College.

3. That the Board of Trustees is the proper agency to authorize the issuance of the bonds voted on May 7, 1965; to cause the bonds to be executed by the officers of the Board of Trustees; to sell the bonds as the obligations of the Junior College District; and to levy taxes on property situated in the Junior College District to pay the interest and principal of said bonds.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Richard C. Ashby.

Yours very truly,

  
NORMAN H. ANDERSON  
Attorney General

ELECTIONS:  
VOTER REGISTRATION:  
RECORDS:  
COUNTY CLERKS:

Voter registration records consisting of pink, blue and white copies of registration sheets required to be kept by the county clerk pursuant to Sections 114.130 and 114.140, RSMo, shall be available for public inspection.

February 16, 1966

OPINION NO. 144

Honorable Norbert J. Jasper  
State Representative  
Franklin County  
Washington, Missouri



Dear Representative Jasper:

This opinion is in answer to your request for an opinion of this office on the question whether the county clerk is permitted to allow the interested public to examine the pink and blue copies of registration sheets mentioned in Sections 114.130 and 114.140 RSMo. Chapter 114 RSMo provides for registration of voters in counties voting to adopt the provisions of such chapter relating to voter registration.

Section 114.130 provides that each person who registers to vote shall sign three sheets or cards, one tinted pink, one blue and one white, containing certain information. Section 114.140 RSMo reads:

"Within twenty days after the last day of the first general registration provided for in this chapter, the county clerk shall arrange alphabetically the pink and blue affidavits of registration into permanent binders, one binder with pink sheets and one binder with blue sheets for each precinct. The white sheets shall be arranged alphabetically in a separate binder, without regard to precinct. The sheets shall be enclosed in a loose-leaf system, with a substantial, strong binding, and each book shall have a lock on the binder so that the sheets cannot be removed without unlocking the binder. The county clerk shall be the custodian of the registration records, and no sheets or records shall be removed or transferred from the binders except under his direction and supervision. The registration records with pink sheets shall be securely kept by the county clerk in his vault, except when given to the appointed election judges for use at elections. The registration books with blue sheets

Honorable Norbert J. Jasper

shall be securely kept by the clerk in his vault and never permitted to leave his custody, except where given to an election judge to be used at the polls in the event that the pink records are lost or are not available for use at the polls on any election day. The record with white sheets, which shall be known as the 'master record', shall be kept by the county clerk in his vault at all times and shall be open to inspection of the public. All three records shall be continuously revised and kept up to date. The county clerk, on the day before any primary or general election for which registration is made, shall deliver to the judges of election, appointed under and by virtue of the general laws of election, proper registration records for their respective precincts and shall take a receipt from the judge to whom the same may be delivered and keep the receipt on file until the records are returned. All affidavits required by this chapter shall be preserved by the county clerk until canceled as a part of the registration records to which they relate."

Section 109.180, RSMo, Cum. Supp. 1965, states:

"Except as otherwise provided by law, all state, county and municipal records kept pursuant to statute or ordinance shall at all reasonable times be open for a personal inspection by any citizen of Missouri, and those in charge of the records shall not refuse the privilege to any citizen. Any official who violates the provisions of this section shall be subject to removal or impeachment and in addition shall be deemed guilty of a misdemeanor and upon conviction shall be punished by a fine not exceeding one hundred dollars, or by confinement in the county jail not exceeding ninety days, or by both the fine and the confinement."

Section 109.190, RSMo, Cum. Supp. 1965, provides:

"In all cases where the public or any person interested has a right to inspect or take extracts or make copies from any public records, instruments or documents, any person has the right of access to the records, documents or instruments for the purpose of making photographs of them while in the possession, custody and control of the lawful custodian thereof or his authorized deputy. The work shall be done under the supervision of the lawful custodian of the



Honorable Norbert J. Jasper

records who may adopt and enforce reasonable rules governing the work. The work shall, where possible, be done in the room where the records, documents or instruments are by law kept, but if that is impossible or impracticable, the work shall be done in another room or place as nearly adjacent to the place of custody as possible to be determined by the custodian of the records. While the work authorized herein is in progress, the lawful custodian of the records may charge the person desiring to make the photographs a reasonable rate for his services or for the services of a deputy to supervise the work and for the use of the room or place where the work is done."

Pursuant to Sections 109.180 and 109.190 supra, the records herein involved would be open for public inspection and copying unless it is "otherwise provided by law". This means that unless public inspection is prohibited as to the registration records made and kept pursuant to Sections 114.130 and 114.140 supra, that such records are required to be available to public inspection.

The provisions in Section 114.140 regarding the storage and use of these records cannot be construed to prohibit public inspection thereof. The section provides that all three records, that is, the books containing pink, blue and white sheets respectively shall be kept in the county clerk's vault. Exception is made for pink and blue sheets when they are given to election judges for use at elections. With respect to the white sheets, the section provides that they "shall be kept by the county clerk in his vault at all times and shall be open to inspection of the public." Thus, the requirement that the records be kept in the county clerk's vault is not inconsistent with making them available for public inspection.

The only language in Section 114.130 supra, which could be interpreted as in any way restricting the right of the public to inspect the registration records is precisely the above mentioned language concerning the requirement of keeping the records in the county clerk's vault. Since this language does not affect the right of the public to inspect records generally, conferred by Sections 109.180 and 109.190 supra, and since there is no other language in connection with these registration records which could be construed as limiting or destroying that right, it is concluded that such records must be made available for public inspection.



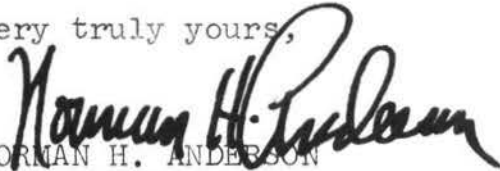
Honorable Norbert J. Jasper

CONCLUSION

It is therefore the opinion of this office that voter registration records consisting of pink, blue and white copies of registration sheets required to be kept by the county clerk pursuant to Sections 114.130 and 114.140, RSMo, shall be available for public inspection and copying.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Donald L. Randolph.

Very truly yours,

  
NORMAN H. ANDERSON  
Attorney General

INSURANCE: A corporation may not be a licensed insurance  
INSURANCE AGENTS: agent. Therefore, an insurance company cannot  
CORPORATIONS: pay agent's commission to a corporate insurance  
LICENSES: agency.

OPINION NO. 145

September 15, 1966

Honorable Robert D. Scharz  
Superintendent  
Division of Insurance  
Jefferson Building  
Jefferson City, Missouri



Dear Mr. Scharz:

Reference is made to your letter requesting a formal opinion of this office as follows:

"We hereby request your formal opinion interpreting Section 375.014 (2) RSMo. 1959 as amended, which was a portion of Senate Bill 94, as to whether an insurance company can legally pay commissions to an 'insurance agency' for whom the agent selling the insurance was working rather than paying the commission directly to the selling agent.

"This question arises due to the fact that this Division does not have any jurisdiction over 'insurance agencies' as such. Agencies are not licensed by this Division. Some agencies are individually owned businesses, some are partnerships, some are corporations. Agents working with these agencies may be on a commission basis or may be on a salary or both. Actually in this situation the agents are employees of the agency."

The licensing of insurance agents is provided for by Sections 375.012 through 375.028, RSMo Cum. Supp. 1965. These statutory provisions refer to the licensing of "persons" repeatedly and at no time is there any reference in the statutes to the licensing of corporations to act as insurance agents.

Section 375.018 sets forth the specific requirements for the licensing of an insurance agent. These requirements include a written application by the prospective licensee which includes personal data such as date of birth, sex, criminal convictions for crimes involving moral turpitude, etc. It is provided that the company for whom the

Honorable Robert D. Scharz

licensee will act as an agent shall file a certificate stating that the company has satisfied itself that the applicant is trustworthy and competent to act as an insurance agent. It is further provided that an applicant shall be required to take and pass to the satisfaction of the Superintendent a written examination to determine the competency of the applicant to act as an insurance agent. All of these statutory provisions are personal and can have no application to the licensing of a corporation to act as an insurance agent.

If the Legislature intended for corporations to act in a licensed capacity, specific provisions for the licensing of such corporations can be made. For example, the statutes provide that a corporation may be licensed as a real estate broker. The Missouri Real Estate Commission requires an applicant for a real estate broker's license to take and pass a written examination designed to determine the applicant's competency to act as a licensed real estate broker. Section 339.030, RSMo 1959, provides that a corporation may be granted a real estate broker's license when individual licenses have been issued to the officers of such corporation and to every person who acts as a salesman for such corporation.

In the absence of statutory provisions for the licensing of corporations as insurance agents this office concludes that a corporation may not be licensed as an insurance agent.

Section 375.014 (2) provides in part as follows:

"2. No insurance company doing business in this state shall pay any commission or other compensation to any person for any services, as agent, in obtaining in this state any contract of insurance except to a licensed agent of the company; \* \* \* "

It has been concluded above that corporations may not be licensed insurance agents. Therefore, an insurance company may not pay any commission or compensation to a corporate insurance agency for services as an agent. The commission or compensation must be paid to a licensed agent.

#### CONCLUSION

A corporation may not be licensed as an insurance agent by the Superintendent of Insurance. An insurance company may not pay any commission or compensation to a corporate insurance agency for services as an insurance agent.

Honorable Robert D. Scharz

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Thomas J. Downey.

Very truly yours,



NORMAN H. ANDERSON  
Attorney General

COUNTY COURTS:  
CIRCUIT JUDGES:  
SALARIES:

With respect to judicial circuits comprising two or more counties, none of which is a county of the second class, unless the county courts of all such counties order an increase of the salary of the circuit judge, none of the counties may lawfully pay any salary in addition to the annual salary of \$16,000 payable by the state. No lesser or greater amount than \$3,000 can be paid to such judge by the counties composing such circuit.

March 8, 1966

OPINION NO. 148

Honorable Elgin T. Fuller  
Judge of Tenth Judicial Circuit  
State of Missouri  
Marion, Monroe and Ralls Counties  
Court House  
Hannibal, Missouri



Dear Judge Fuller:

This is in answer to your request for an opinion of this office on the question whether, pursuant to Section 478.013, RSMo, Cum. Supp. 1965, the salary of the Judge of the Tenth Judicial Circuit may be increased beyond \$16,000 annually in the event that two of the three counties composing the circuit order an increase but the third county has made no such order.

Paragraph 3 of said Section 478.013, RSMo, Cum. Supp. 1965 reads:

"All other judges of the circuit courts of this state shall each receive an annual salary of sixteen thousand dollars payable by the state out of the state treasury. If the county courts of all of the counties composing a circuit so order, the judge of that circuit shall receive an additional three thousand dollars per annum to be paid by the counties composing the circuit, the counties contributing equal amounts."

You state that the counties of Marion, Monroe and Ralls comprise your circuit, that the county courts of Marion and Ralls have ordered an increase in your salary of \$1,000 from each of said two counties, but that the Monroe county court is unwilling to issue such an order. You inquire whether fewer than "all" of the counties composing a circuit may lawfully pay the increase to the circuit judge.

Honorable Elgin T. Fuller

Article V, Section 24, Constitution of Missouri 1945 provides that all judges shall receive as salary "the total amount of their present compensation until otherwise provided by law." Provisions of law contemplated in the constitutional language means legislative enactment. A county court has only such power as is expressly granted to it by the Constitution and statutes are necessarily implied therefrom. *King v. Maries County, Mo.*, 249 S.W. 418; *Everett v. Clinton County, Mo.*, 282 S.W.2d 30; *State ex rel. v. County Court of Barry County, Mo.*, 363 S.W.2d 691. There being no other statutory authority for county courts to fix or contribute to the salaries of circuit judges, the county would have no power in the premises in the absence of Section 478.013, *supra*.

Subsection 3 of said statute, quoted above, applies to the Tenth Judicial Circuit comprising three counties, and states that the circuit judge shall receive an additional \$3,000 per annum if the county courts of "all" of the counties composing the circuit so order. It is neither a necessary nor a fair inference from that language that fewer than all counties may act in the premises or that a lesser amount than \$3,000 compensation can be paid by the counties.

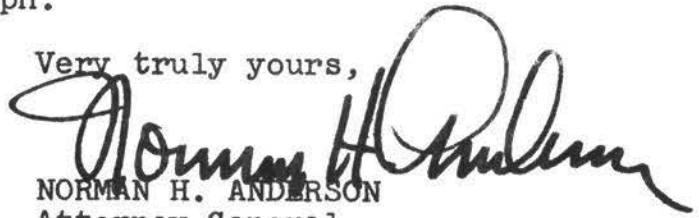
You have not asked, we do not consider, and we do not pass upon the constitutionality of said Section 478.013.

#### CONCLUSION

It is therefore the opinion of this office that, with respect to judicial circuits comprising two or more counties, none of which is a county of the second class, unless the county courts of all such counties order an increase of the salary of the circuit judge, none of the counties may lawfully pay any salary in addition to the annual salary of \$16,000 payable by the state. It is further the opinion of this office that no lesser or greater amount than \$3,000 can be paid to such judge by the counties composing such circuit.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Donald L. Randolph.

Very truly yours,

  
NORMAN H. ANDERSON  
Attorney General

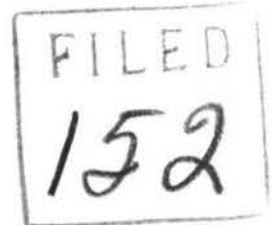


ELECTIONS: With respect to the provisions of Section  
ABSENTEE BALLOTS: 112.060, RSMo 1959, in the event that the  
COUNTY CLERKS: central committees of the dominant political  
parties submit lists of persons who are un-  
able or unwilling to serve and are therefore less than double  
the number required by law the county clerk or the board of  
election commissioners may select persons of the proper political  
faith from outside the lists to make up double the number required  
and may appoint therefrom. In the event that all of the persons  
on the lists submitted by the central committees refuse to serve,  
the county clerk or the board may act as though the committee  
had failed to present a list of names as required and may, them-  
selves, select and appoint the requisite number as required and  
provided by law for the party for the purpose of opening and  
counting the absentee vote.

OPINION NO. 152

March 28, 1966

Honorable Joe R. Ellis  
Prosecuting Attorney  
Barry County Courthouse  
Cassville, Missouri



Dear Mr. Ellis:

This is in response to your request for an opinion in  
reference to the provisions of Section 112.060, RSMo 1959,  
as follows:

"My specific question is as follows:  
When the County Clerk of Barry County ap-  
points persons to open, count and canvass  
absentee ballots from a list of names con-  
taining double the number of persons re-  
quired for appointment which is submitted  
the clerk by the Central Committees of the  
dominant political parties in accordance  
with Section 112.060, Missouri Revised  
Statutes, 1959, and the person or persons  
so appointed refuse to serve, what is the  
duty of the County Clerk? Specifically,  
must he appoint from the persons remaining  
on the list submitted? May he designate  
others outside the submitted list of the  
proper political faith to open, count and  
canvass the absentee ballots? Also, what  
is the duty of the Clerk should all those  
persons on the list submitted refuse to  
open, count, and canvass the ballots."

Section 112.060, states in part as follows:

"1. The official charged with the duty of issuing such ballots to absent voters for the district, ward or precinct in which the absent voter resides shall receive the ballot of the absent voter and safely keep and preserve the same unopened in his office. At least twenty-four hours before the ballot is opened and canvassed, the official shall make a complete list of the names of the absent voters whose ballots have been received and shall cause the list thereof to be posted in some conspicuous place in his office, which list shall also show the precinct in which the absent voter claims to be a resident. The list shall be open to public inspection.

"2. Whenever the county clerk and his assistants, or the board of election commissioners, as the case may be shall meet to canvass the votes according to law, the county clerk, or the board of election commissioners, shall first appoint not less than four disinterested persons, from the two dominant political parties, not more than one-half of whom shall be of the same political faith, from a list, furnished the county clerk, or the board, by the central committee of each of the two dominant political parties, double the number required for appointment, not later than six o'clock p.m., of the day next succeeding the day of the election. If any political party, through its committee, fails to present a list of names as aforesaid, within the time aforesaid, then the county clerk, or the board, may select and appoint the requisite number provided by law for the party, for the purpose of opening and counting the absentee vote. In determining the total number of persons to be appointed to open, canvass, count and certify the votes, the county clerk, or board of election commissioners, as the case may be, may appoint four additional disinterested persons in the manner above provided for each additional three hundred ballots, or major portion thereof, delivered to the issuing official or officials after the first three hundred ballots so delivered.

Honorable Joe R. Ellis

The person so appointed shall take the oath prescribed for the regular judges of election." (Emphasis added.)

Prior to the Laws of 1945 (Section 11475, RSMo 1939), appointments were made by the county court or the board of election commissioners solely from disinterested persons from two dominant political parties and there was no requirement that the county court or the board of election commissioners select from a list furnished the county court or the board by the central committee of each of the two dominant political parties as required in paragraph two of this section.

Although we are unable to find any applicable judicial interpretations, we believe that the language used can be resolved logically.

Despite the fact that paragraph two does require the political party through its central committee to present a list of names "as aforesaid" it would not be reasonable to conclude that such a list was not presented properly or that the list was invalid for the reason that some of the parties named therein could not or would not serve. It is presumed that the committees acted in good faith and certified to the best of their ability the names of those persons whom they believed to be willing to serve. In the event that some of the parties named are unwilling or unable to serve, we think that the county clerk or the board may select persons to make up the additional double number required, provided by law for the party, and make appointments therefrom.

The statute indicates that it was the intent of the legislature that the county clerk or the board select and appoint from the lists provided by the central committees. Considering that the central committees could not have complete control over individuals or Acts of God that may affect or interfere with the named persons services, it would not seem that a resultant insufficiency would authorize the clerk or the board to treat the entire list as though it had not been submitted.

On the other hand, it is not reasonable to conclude that the clerk may not supplement the deficiency. Whether the fact that the law requires that a list in double the number required be submitted is indicative that it was intended that the clerk or the board has a choice of selection or whether it was based upon the reasoning that there should merely be sufficient supplemental names to anticipate an ultimate shortage of persons available, the fact still remains that the clerk or the board is given some statutory discretion in making the appointments.

Honorable Joe R. Ellis

Primarily the law requires the appointment of persons from two dominant political parties by a selection from a list of double the number required for appointment. If the clerk or the board were forced to appoint from lists furnished of less than double the number willing to serve they would be deprived of their discretion and such would thwart the intent of the legislature. It would therefore be the duty of the county clerk or the board to select additional names for the party if such was necessary in order to arrive at double the number required and to thereafter appoint from this list the number required to serve. Necessarily the persons selected must meet the requirements of the section.

Although at least double the number of names required must be submitted by the central committee, we feel that this quantity is intended to be a statutory minimum and that the central committee may submit a list of names exceeding "double the number," and thereby eliminate any possibility of having an insufficiency of persons willing or able to serve.

Obviously, if all the persons on the list submitted refused to serve, the county clerk or the board may make direct selections as alternately provided by law.

#### CONCLUSION

It is therefore the opinion of this office that:

With respect to the provisions of Section 112.060, RSMo 1959, in the event that the central committees of the dominant political parties submit lists of persons who are unable or unwilling to serve and are therefore less than double the number required by law the county clerk or the board of election commissioners may select persons of the proper political faith from outside the lists to make up double the number required and may appoint therefrom. In the event that all of the persons on the lists submitted by the central committees refuse to serve, the county clerk or the board may act as though the committee had failed to present a list of names as required and may, themselves, select and appoint the requisite number as required and provided by law for the party for the purpose of opening and counting the absentee vote.

The foregoing opinion, which I hereby approve was prepared by my assistant, John C. Klaffenbach.

Yours very truly,

  
NORMAN H. ANDERSON  
Attorney General

August 5, 1966



Opinion 154  
Answered By Letter  
(DeFeo)

Honorable W. D. Hibler, Jr.  
Representative, Chariton County  
Brunswick, Missouri

Dear Representative Hibler:

We have studied the legal problems connected with a proposal to lease the Dalton Vocational School Property by the Curators of Lincoln University to the Brotherhood of Christian Unity and we believe after consideration of all relevant factors this can legally be done.

We recommend that negotiations go forward looking toward an acceptable agreement between the interested parties.

Yours very truly,

NORMAN H. ANDERSON  
Attorney General

cc: Dr. Dawson

LCD:mm

February 3, 1966



Honorable James G. Lauderdale  
Lafayette County Prosecuting Attorney  
Lexington, Missouri

Dear Mr. Lauderdale:

Your letter of January 25, 1966, requests an opinion from this office on the following question:

"Is there any legal reason why a Deputy Probate Clerk, who has been appointed by an elected Probate Judge, to do clerical work in the Probate Court, cannot, if elected, also serve in the office of Public Administrator."

Section 473.117 RSMo 1959, is as follows:

"1. No judge or clerk of any probate court, in his own county, or his deputy, no person under twenty-one years of age, or of unsound mind, no habitual drunkard, and, except as otherwise provided by law, no person who is a nonresident of this state, shall be executor or administrator. No executor of an executor, in consequence thereof, shall be executor of the first testator."

It is to be seen that this section states that, "no clerk of any Probate Court in his county, or his deputy, \* \* \* shall be executor or administrator." Hence, we believe that this answers your question in the negative, and that a deputy probate clerk cannot also serve in the office of public administrator. We trust that this answers your question.

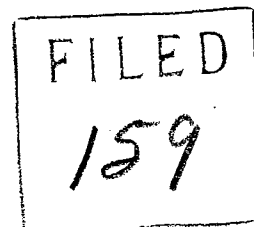
Yours very truly,

NORMAN H. ANDERSON  
Attorney General



March 8, 1966

Opinion Request No. 159  
Answered by Letter  
Randolph



Honorable William H. Bruce  
Prosecuting Attorney  
Reynolds County  
Centerville, Missouri

Dear Mr. Bruce:

This letter is in answer to your request for an opinion of this office on the question whether the County Clerk of Reynolds County may serve and be compensated as assistant highway engineer at a time when Reynolds County does not have a duly appointed highway engineer.

We enclose copies of the opinion of the Attorney General dated November 19, 1948 addressed to Honorable John A. Johnson and Opinion No. 152 dated November 4, 1965 to Honorable Haskell Holman. Under these opinions a county clerk or a deputy county clerk of a third or fourth class county may also serve as highway engineer or assistant highway engineer.

As to whether an assistant highway engineer may be appointed where there is no highway engineer, it seems illogical that an assistant to an officer would have any functions to perform when there is no officer for him to assist.

Section 61.200, RSMo, provides that the county highway engineer with the approval of the county court may appoint one or more assistants. The attached opinion of the Attorney General under date of January 28, 1954 to Mr. Frank W. May holds that a deputy recorder has no official existence after the death of the recorder who appoints him. The same reasoning yields the conclusion that when the official required to appoint an assistant does not exist in

Honorable William H. Bruce

fact, such assistant cannot exist in law. In short, since Section 61.200, supra, authorizes the county highway engineer to appoint assistants with the approval of the county court, the court may not appoint them alone.

We think therefore that it would be improper for the county court to appoint an assistant highway engineer when there is no duly appointed highway engineer.

Very truly yours,

NORMAN H. ANDERSON  
Attorney General

July 1, 1966

OPINION NO. 160  
Answered by Letter-Mansur

Honorable Jack L. Duncan  
Prosecuting Attorney for Iron County  
Ironton, Missouri

Dear Mr. Duncan:



You requested an opinion from this office as follows:

"Are the following properly classified as personal property or as real estate for the purpose of County tax assessment: Stone crushers installed on specially constructed concrete foundations, and bolted thereto, designed for crushing granite rock from approximately three feet in diameter down to course gravel size, together with conveyor belt and roller systems for transporting large quantities of said rock from one crushing device to another, all of said equipment being used in a factory producing colored granules of granite of the diameter of course sand?"

It is assumed for the purposes of this opinion that the property mentioned herein is owned by the same person.

Statutory provisions for assessing and levying property tax is found in Chapter 137, V.A.M.S.

Real property for tax purposes is defined in Section 137.010, Subdivision [2] V.A.M.S. as follows:

"(2) 'Real property' includes land itself, whether laid out in town lots or otherwise, and all growing crops, buildings, structures, improvements and fixtures of whatever kind thereon,

Honorable Jack L. Duncan

and all rights and privileges belonging or appertaining thereto;"

Taxable personal property for tax purposes is defined in Section 137.010, Subdivision [3] as follows:

"(3) 'Tangible personal property' includes every tangible thing being the subject of ownership or part ownership whether animate or inanimate, other than money, and not forming part or Parcel of real property as herein defined."

Section 137.010 (2), supra, defines real estate for taxation purposes as including "fixtures of whatever kind thereon."

A fixture is an article of the nature of personal property which has been so annexed to the realty that it is regarded as part of the land and partakes of the legal incidence of the freehold, and belongs to the person owning the land.

Whether an article is a fixture or not depends upon the facts and circumstances of the particular case. It is a well established rule that the elements of a "fixture" are commonly said to be annexation, adaption, and intent, with the latter ordinarily of a paramount importance at least in case of controversy of seller and purchaser.

These elements or tests all present a question of fact and are not ordinarily resolvable by law.

In determining the intentions of the person making the annexation, the court or jury is not bound by his testimony on this point nor by his secret or undisclosed purpose but may decide this issue from his acts and conduct and surrounding facts and circumstances. Bastas vs. McCurdy, 266 S.W.2d 49; Crane Company vs. Epworth Hotel Construction and Real Estate Company, 98 S.W.2d 795.

The above principle of law should be applied in determining whether the property in question is a fixture within the meaning of the above statute and should be assessed as part of the realty. It is obvious that these factual matters cannot be determined from the information submitted in the opinion request.

Honorable Jack L. Duncan

Therefore, the ultimate conclusion as to whether property in question should be classified as a fixture cannot be reached until after these factual matters have been determined.

In 84 C.J.S., "Taxation" paragraph 73, page 185, it is stated:

"Generally speaking, where personal property has been annexed to realty so as to become a fixture in accordance with the rules considered in Fixtures §1 et seq, it is taxable as real property. The rule discussed in Fixtures §2, making the intention of the person making the annexation a test for determining whether the article has become a fixture, applies for tax purposes, and such intention must be determined by physical facts or reasonably manifested outward appearances without regard to the annexor's status as landlord or tenant. It has been declared that, in matters relating to taxation, rules more nearly conforming to those used in determining what constitutes fixtures as between grantor and grantee, vendor and vendee, or mortgagor and mortgagee, should apply rather than the rule used in determining what constitutes removable fixtures as between landlord and tenant. Where the tax statute itself sets up standards to determine whether or not property annexed to realty is taxable as realty, those standards, rather than the common-law rules defining fixtures, must govern. An agreement between private parties, whether express or implied, as to whether fixtures are to be considered personalty or realty, is not binding on the taxing authorities. \* \* \*"

In Davis vs. Mugan, 56 Mo. App. 311, the issue considered was the title to a steam boiler, engine and machinery, the building covering the machinery and also a rock crusher. The crusher itself weighed about 23,000 lbs., and was attached to two beams which rested on other beams as a foundation and was located about twenty feet from the building. Defendants executed a mortgage on the real estate which later was foreclosed and plaintiff became the purchaser of the property. In holding that the house, engine, boiler, building and rock crusher were fixtures and belonged to the plaintiff as part of the real estate, the Court stated, l.c. 315:

"It will be seen, that this is a controversy between the mortgagor and mortgagee--the question being, whether this stone mill, consisting of boiler, engine and machinery

and building, was personal property, or had it become a part of the realty by reason of its attachment thereto. If it was the latter, then plaintiff was entitled to it, and the judgment of the circuit court was correct; if the former, it was erroneous.

"By fixtures are meant those articles which were chattels, but which have become a part of the real estate by reason of being annexed or affixed thereto. But while this definition, in substance, is repeated in the books, there are scarcely any rules for determining when chattels become so annexed or fixed. Each case is made to turn largely on its particular circumstances. In controversies between landlord and tenant there is a most liberal indulgence towards the claim of the tenant. He is permitted to hold as chattels most any improvement he may place on the leased premises, and allowed to remove the same during his tenancy; conditioned, only, that in so removing he do not injure the freehold. This liberal treatment towards the tenant, comes, not only from the law's encouragement of industry and trade, but because it will be assumed that, in placing the chattels in that condition, it was the intention of the tenant at the time, to remove it and that the landlord so understood it.

"But as between vendor and vendee, heir and executor or administrator and mortgagor and mortgagee, there is no such indulgence towards him who annexes personal property to the land; a much stricter rule applies, and the presumption is the contrary of that given to the tenant. For it will there be presumed that the owner of the land intended the improvement as an accessory to the inheritance and as a lasting benefit thereto. It will not be presumed that the owner of the fee intended the work as a mere temporary improvement, to be by him taken away in case he should sell the land, or to be removed in case the mortgagee should foreclose.



"Under the old law, the principal test as to what was or was not a fixture, was said to be the nature of the physical attachment to the soil. But this theory has long since been exploded. 'And while courts still refer to the character of the annexation as one element in determining whether an article is a fixture, greater stress is laid upon the nature and adaptation of the article annexed, the uses and purposes to which' the land 'is appropriated at the time the annexation is made, and the relations of the party making it to the property in question, as settling that a permanent accession to the freehold was intended to be made by the annexation of the article.' 1 Wash., Real Property [5 Ed.], p. 22.

"Little fault, then, can be found with defendant's counsel when they so earnestly insist that the intention of the freeholder and mortgagor in erecting this stone mill should have great weight in determining its character, that is, whether or not Mugan intended the same as a permanent structure. But, as said by Henry, J., in State Savings Bank v. Kercheval (65 Mo. 682), 'the intention of the party making the improvement, ultimately to remove it from the premises, will not, by any means, be a controlling fact. One may erect a brick or stone house with an intention, after brief occupancy, to tear it down and build another on the same spot, but that intention would not make the building a chattel. The distinction which gives a movable object an immovable character, results from facts and circumstances determined by the law itself, and could neither be established nor taken away by the simple declaration of the proprietor,' citing, Snedeker v. Warring (2 Kernan 178). The same learned judge quotes further from Teaff v. Hewett (1 Ohio St. 511), where, in speaking of this intention of the party in making the article a permanent accession to the freehold, the Ohio court says, that such an intention as will be 'inferred from the nature of the article as fixed, the relation and situation of the party making the annexation, the structure and mode of annexation and the purpose and use for which the annexation has been made, is a

Honorable Jack L. Duncan

controlling circumstance in determining  
whether the structure is to be regarded as  
a fixture or not."

The above principles of law should be applied in making the determination as to whether particular property should be assessed as part of the realty. In making this determination all relevant facts must be considered and determined before a legal conclusion can be reached as to whether this particular property is or is not part of the realty. Under the law the county assessor is vested with authority to make these factual determinations.

Very truly yours,

NORMAN H. ANDERSON  
Attorney General

MM:cw

June 22, 1966



Mr. Charles Claflin Allen  
Lewis, Rice, Tucker, Allen and Chubb  
Attorneys at Law  
1555 Railway Exchange Building  
611 Olive Street  
St. Louis, Missouri 63101

Re: Shaw Trust - Shaw's Garden

Dear Mr. Allen:

This is in further reference to your letter of January 20, 1966, relating to the authority of the trustees of the Henry Shaw Trust who manage and operate Shaw's Garden in which you ask the views of the Attorney General on a proposal to charge admission to the Garden. The Attorney General deems it inappropriate to render any opinion on this matter for two reasons:

1. The limitations placed upon the Attorney General in rendering opinions by Section 27.040, RSMo 1959.
2. Because if any controversy arises or litigation respecting any action or proposed action of the trustee, it is the obligation and the duty of the Attorney General to represent the public interest.

This office has carefully reviewed your letter, Henry Shaw's Will establishing the Missouri Botanical Gardens, a copy of Henry Shaw's suggestions to the trustees dated October 1883, your memorandum on the question of the authority of the trustees to charge admission to the Garden, income and expense statement for the years ending June 30, 1961, to the year ending June 30, 1965, inclusive, the list of names and addresses of the Board of Trustees.

Mr. Charles Claflin Allen

Because of the Attorney Generals responsibilities respecting public charitable trusts we have examined these documents which you have submitted and make the following observations:

1. The responsibility for making the determination and decision as to whether or not admission to Shaw's Garden is to be charged belongs exclusively to the Trustees.
2. The Attorney General will not participate in the decision of the Trustees nor interfere with their decision unless the Attorney General believes that such a decision is unauthorized by law or that the public interest will be adversely affected.
3. In the event the Trustees are in doubt about their power, we believe it would be appropriate for the Trustees to seek instructions of a Court of Equity in a proper proceeding.
4. The Will of Henry Shaw contains no provision respecting the matter of charging admission to the Garden and it contains no prohibition or limitation on the Trustees with respect thereto. The only provision that might be deemed to relate to this subject is found in Paragraph numbered "2nd" on Page 4 of the printed will which directs that the Trustees should keep the garden "open during such hours, and under such regulations as they shall prescribe every day except Sundays, for the use of the public at large."
5. The Suggestions of Henry Shaw dated October 1883 in Paragraph 14 contain the following language:  
"The garden under proper rules and regulations as to hours, to be open every day of the week to the public, except Sundays, the library and herbarium only by permission of the curator or secretary; if financial embarrassments should occur, and rather than the garden should be closed for want of funds, an entrance fee may be required of visitors at the discretion of the Trustees."

Mr. Charles Claflin Allen

6. The income and expenses for the operation of the Garden appear from the information furnished that the Garden has operated at a loss in each of the five years with the exception of the year ending June 30, 1965.

7. It appears from your Memorandum on the authority of the Trustees to charge admission that you have concluded in the last sentence thereof "For all these reasons it seems clear that the Trustees have authority under the will to charge a reasonable fee for admission." It would appear that the Trustees could reach the conclusion that they are empowered under the will and the applicable law, and all the surrounding circumstances and that they have the power to make a reasonable admission fee charge to visitors in Shaw's Garden.

8. Nothing in these observations is to be considered as an attempt by the Attorney General to persuade the Trustees to charge admission to Shaw's Garden or to dissuade them from so doing. The decision to charge or not to charge admission is the exclusive responsibility of the Trustees, unless relieved of that responsibility by appropriate instructions from a Court of Equity.

In the event the Trustees feel that they need the advice and instruction of a Court of Equity before they promulgate a rule or regulation to charge admission to the Garden, this office will assist in expediting a decision by the Court. We assume that, of course, you would make the Attorney General a party to such an action and we would not require you to have the sheriff serve process upon the Attorney General but would promptly enter appearance and file an Answer so that the Court could hear the matter promptly at the earliest convenience of the Court. Of course the Attorney General would feel that the Trustees should satisfy the Court of the correctness of their position whatever it might be.

In the event such a suit is brought it is the policy of the Attorney General to request the Court to retain jurisdiction of the Trust for such future advice, orders and direction as may from time to time be necessary and further to furnish to the Attorney General copies of the trustees report respecting income, expenditures and trust investments.

Mr. Charles Claflin Allen

Even if no suit is brought the Attorney General, because of his obligation to protect the public interest and his supervisory authority over public charitable trusts would appreciate the courtesy of the Trustees in furnishing to the Attorney General a copy of the Trustee's periodic reports respecting income, expenditures, character and nature of trust investments and such other information as would be helpful to the Attorney General in determining the propriety of the Trustees actions in the administration of the trust.

Yours very truly,

NORMAN H. ANDERSON  
Attorney General



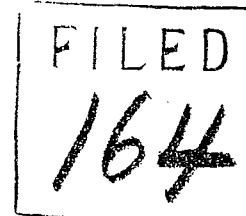
SCHOOLS:  
TEACHERS:  
LICENSES:  
RELIGION:  
STATE BOARD OF EDUCATION:

(1) Where an applicant for a public schoolteacher certificate has the required amount of academic and professional preparation as required by Section 168.021, RSMo. Supp. 1965, and has presented evidence of good moral character as provided by Section 168.031, RSMo. Supp. 1965, the State Board of Education must issue a certificate; (2) The legislature in prescribing the requirements for certification as a public schoolteacher has not required that the applicant be presently employable, nor has it prohibited a cleric or religious from being certificated. The State Board of Education cannot lawfully add such as prerequisites in excess of those prescribed by statute; (3) Membership in the ordained clergy or in a religious order does not prevent a qualified person from being lawfully employed as a teacher of secular subjects in a public school; (4) An obligation to remit all or part of his salary to a religious organization or church does not prevent a qualified person from being lawfully employed as a public schoolteacher; (5) The teaching of religion as such in the public schools by any person is prohibited; (6) In the absence of a valid statute or judicial decree meeting requirements of due process of law, a qualified person cannot be excluded from employment as a public schoolteacher because he has taken a religious vow.

OPINION NO. 164

June 2, 1966

Honorable Hubert Wheeler  
Commissioner of Education  
Jefferson Building  
Jefferson City, Missouri



Dear Mr. Wheeler:

This official opinion is issued in response to your request for a ruling.

You inform us as follows: A person has applied to the State Board of Education for a public school teaching certificate. This applicant has all the academic and professional qualifications required by statutes and regulations which are prerequisite to certification. The applicant is a member of a religious order or the clergy of the Roman Catholic Church. The State Department of Education has denied certification.

Honorable Hubert Wheeler

In regard to the above you ask three questions, to wit:

"A.

"Under the law, should a public school teacher's certificate be granted to a person, otherwise qualified, whose regular vocation is of a church or clerical character and whose vows, religious loyalties or obligations may involve one or more of the following:

- (1) the wearing in the classroom of distinctive garb associated by the public with a particular religion or with religion in general;
- (2) the remittance of wages to a religious order pursuant to a vow of poverty or other obligation;
- (3) a religious vow which would or might be construed to require such a person to attempt to impart his religious views to students under his charge in the classroom?"

"B.

"Could such a person be legally hired by a local board of education to teach in the public schools, and if he could not, should or can the State Board of Education grant a certificate to him?"

"C.

"Is the denial of a public school teacher's certificate to such a person a violation of the Civil Rights Act of 1964?"

We shall discuss each question separately.

A.

May the State Board of Education lawfully refuse to issue a public schoolteacher's certificate to an applicant on the ground that the applicant is a cleric or religious with certain vows?

Honorable Hubert Wheeler

The issuance of public school teaching certificates is provided for in Sections 168.021 and 168.031, RSMo Supp. 1965, to wit:

"168.021. Certificates of license to teach in the public schools of the state shall be granted as follows:

(1) By the state board of education, under rules and regulations prescribed by it,

(a) Upon the basis of college credit;

(b) Upon the basis of examination;

(c) To each student completing in a satisfactory manner at least a two-year course in a city training school as provided for in section 178.410, RSMo.

(2) By the Missouri state colleges, state teachers' colleges, the University of Missouri and Lincoln University to graduates receiving the degree of bachelor of science in education, a life teaching certificate bearing the signature of the commissioner of education and which shall be registered in the state department of education.

(3) By the county superintendents of schools upon the basis of examination as provided in section 168.041, a county certificate entitling the holder to teach only in the county of issuance for a period of one year."

"168.031. No person shall receive or hold any certificate who does not present evidence of good moral character, and who, except those persons who held certificates entitling them to teach in the public schools on September 1, 1927, has not satisfactorily completed a four-year approved high school course. The high school work may be done in any public, private or parochial school."

As manifested by Sections 168.021 and 168.031, a teacher's certificate certifies only that the holder has, upon the basis of college credit or examination, the required minimum of academic and professional preparation and has presented evidence of good moral character.

Honorable Hubert Wheeler

The State Board has discretion to determine whether or not an applicant has the prescribed college credits or has passed the prescribed examination and has presented evidence of good moral character. However, once these requirements are met, the State Board's discretion ends.

Section 168.021 is stated in express mandatory words, "Certificates . . . shall be granted."

The law is clear that once the statutory conditions have been complied with, the board has no discretion to refuse to issue the certificate. Numerous cases are annotated in 121 A.L.R. 1472. Also see: 47 Am.Jur., Schools, § 110.

If officials refuse to issue the certificate, mandamus will lie to compel them to act as required by law; 55 C.J.S., Mandamus, § 152d(1); State ex rel Gorman v. Offutt, Mo.App., 26 S.W.2d 830.

Do the statutes or regulations thereunder require as a prerequisite to issuance of a certificate that the applicant not be a cleric or religious?

The statutes, Section 168.021 and 168.031 quoted supra, do not contain any such requirement.

Our State Constitution and statutes require all administrative agencies to file their rules and regulations with the Secretary of State at least ten days before they are effective. Article IV, Section 16, Missouri Constitution 1945; Section 536.020, RSMo 1959.

You have furnished this office with all rules and regulations adopted by the State Board of Education for the certification of teachers. Upon examining these materials we do not find any rule or regulation concerning the certification of clergy or religious. We assume that the State Board of Education has not adopted any rule or regulation prohibiting the certification of clergy or religious.

Of course, only the State Board lawfully convened can adopt rules and regulations. Neither the Commissioner of Education nor any subordinate has the power to prescribe additional certification requirements.

If, however, the State Board of Education had, or should in the future adopt, a regulation prohibiting a cleric or religious from being eligible for certification, such a regulation would be without authority of law and void.

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Only the legislature has the power to make laws. Further, an attempt by the legislature to delegate its legislative powers would be invalid. The rule-making power of an administrative body is circumscribed by and may not exceed or contradict the statutes.

In a case dealing with the Public Service Commission, the Missouri Supreme Court stated:

"The legislature has declared the public policy of this state, regarding the transfer of certificates. Respondent is merely the instrumentality of the Legislature, created for the purpose of carrying out that policy. It has no power to adopt a rule, or follow a practice, which results in nullifying the expressed will of the Legislature.

It cannot, under the theory of 'construction' of a statute, proceed in a manner contrary to the plain terms of the statute; \* \* \*" State ex rel Springfield Warehouse and Transfer Co., et al, v. Public Service Commission, 225 S.W.2d 792, 794.

The power of a Board of Education to make rules was expressed by the Supreme Court of Missouri in Wright, et al, v. Board of Education of St. Louis, Mo., 246 S.W. 43, 45:

"The power of the board to make the rule in this case is to be considered prior to a determination of its reasonableness. The power delegated by the Legislature is purely derivative. Under a well-recognized canon of construction, such powers, however remedial in their purpose, can only be exercised as are clearly comprehended within the words of the statute or that may be derived therefrom by necessary implication; regard always being had for the object to be attained. Any doubt or ambiguity arising out of the terms of the grant must be resolved in favor of the people. \* \* \*"

Also see: 73 C.J.S., Public Administrative Bodies and Procedures, § 94.

Recently this office ruled upon the validity of a regulation concerning the registration of land surveyors (Opinion No. 356, Barton, 9-22-65, copy enclosed herewith). The proposed

Honorable Hubert Wheeler

regulation attempted to enlarge the statute by imposing an additional requirement. Based upon the legal principles *supra*, the regulation was ruled to be invalid and beyond the power of the administrative board.

Subsequent to Opinion No. 356, the validity of this regulation was put in issue before the Administrative Hearing Commission of the State of Missouri.

In Schulte v. State Board of Registration for Architects and Professional Engineers, No. 65001, decided February 10, 1966, Commissioner Bushmann ruled:

" \* \* \* [The Board's] action, resulting from their construction of the law, is arbitrary, capricious and unreasonable. Respondent is authorized to administer the law as it is written. It is not empowered to add or subtract from the statute. Powers not conferred are just as plainly prohibited as those which are expressly forbidden. When powers are given to be performed in a specified manner, there is an implied restriction upon the exercise of those powers in excess of the grant."

\* \* \* \* \*

"Since petitioner satisfied all the requirements of the statute, he is legally entitled to a land surveyor's license. Respondent has no discretion to increase these legislative conditions. Since there is no dispute as to whether plaintiff meets the statutory requirements, then it is mandatory that the Board issue petitioner a license. The statute does not give respondent authority to make a determination on a subject not set out in the statute."

The factors here involved are quite similar to those in Schulte, *supra*.

Your letter refers to the case of Berghorn v. Reorganized School District No. 8, Franklin County, Mo., 260 S.W.2d 573. Seemingly this decision has been interpreted to prohibit the issuance of public school teaching certificates to clerics or religious.



Honorable Hubert Wheeler

Since we shall discuss the Berghorn case under Part B, hereinafter, it suffices here to say that the certification of teachers was not an issue before the Supreme Court and nothing in the Court's decision authorizes the State Board of Education to deny certification because the applicant is a cleric or religious.

Therefore, as to the first question: it is our opinion that the refusal to issue a public school teaching certificate because the applicant is a religious or cleric is without any legal basis.

B.

The second question: Can a public school board lawfully employ as a teacher one who is a cleric or religious with vows involving one or more the following:

"(1) the wearing in the classroom of distinctive garb associated by the public with a particular religion or with religion in general;

"(2) the remittance of wages to a religious order pursuant to a vow of poverty or other obligation;

"(3) a religious vow which would or might be construed to require such a person to attempt to impart his religious views to students under his charge in the classroom?"

We shall assume, per your information, that the person in question meets the academic and professional qualifications prescribed by law, is of good moral character, has been duly certificated, has provided the health certificate required by Section 168.131, and met other legal requirements for employment as a public schoolteacher.

Chapter 168, RSMo Supp. 1965, deals with the employment of public schoolteachers. There is nothing in this chapter which prohibits a public school board of education from employing as a teacher a cleric or religious.

School boards are free to exercise sound discretion in the selection of teachers whom they believe to be competent. Boards

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are vested with the power to exercise their judgment and discretion in employing and removing teachers so long as their judgment is not unreasonable, arbitrary, capricious or unlawful. State ex rel Wood et al., v. Board of Education of City of St. Louis, Mo., 206 S.W.2d 566, 567.

Your letter refers to the case of Berghorn v. Reorganized School Dist. No. 8, Mo., 260 S.W.2d 573. We shall give detailed attention to the Berghorn case, and also the earlier case of Harfst v. Hoegen, Mo., 163 S.W.2d 609.

The Court's opinion in Berghorn sets forth at length the facts under which the schools in question there operated. These facts were as follows: The defendant was a reorganized public school district which operated three elementary schools. Prior to 1931 all three schools had been operated by the Roman Catholic Church as parochial schools. After 1931 the defendant public school district operated these three schools. Title to the school buildings remained in the church officials. With one exception, no rent was paid for the buildings. The buildings were on the same tract of land with the church and other church buildings. There were religious symbols on the buildings.

The teachers, with one exception, were all members of religious orders of the Roman Catholic Church. The teachers were educationally qualified. The directors of the district had, without exception, employed any nun assigned to teach in the district by the superior of the religious order. The nun teachers at all times wore distinctive religious garb including religious emblems and symbols. They had taken vows of poverty, obedience and chastity. They were paid salaries by the district and out of their salaries paid their living expenses, income taxes and teachers retirement contributions. They were bound by their vows to place any balance of their salary in the common treasury of their religious order. The Catholic pupils of the schools attended Mass and received religious instructions from the nun teachers. Catholic pupils were excused during school hours to serve as acolytes. Non-Catholic pupils were required to wait in the school buildings or grounds during morning religious services. They were permitted to attend the services if they desired.

The principal issue before the Court was whether the school was a free public school entitled to public funds. The lower court seemingly had the view that the Roman Catholic nuns in the case could not lawfully qualify as public schoolteachers(l.c. 579). The trial court, in the course of enjoining the operation of the parochial school as a part of the public school system, enjoined

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the public school board from employing as teachers the nuns of the particular religious orders involved. However, since the schools in question were not public schools, but as the trial court found, parochial schools unlawfully operated by a public school district, the question of whether these nuns could be lawfully employed as teachers in a public school was not in issue before the trial court.

Not being before the trial court, likewise this question was not before the Supreme Court on appeal. After stating at length that appellants had failed to comply with court rules and thus had not preserved all errors of the trial court for review, the Court said that the only issues before the appellate court were, l.c. 580:

" \* \* \*(1) 'The trial court erred in recognizing respondents' right to sue'; (2) 'The trial court erred in finding that the teachers in defendant schools are not indispensable parties'; and (3) 'The trial court erred in finding that defendant schools are not free public schools and in enjoining their operation, in that there was no finding by the trial court that children in defendant schools have been influenced or coerced by any sectarian matter.' \* \* \*"

The Supreme Court ruled only on these three issues.

As to the third issue, which the court referred to as the "pole star" inquiry in the case, the Court stated, l.c. 583:

"In determining the issue presented we are not limited to a consideration of any particular fact separate and apart from all other facts and circumstances shown by the whole record. We must consider the total effect of all of the facts and circumstances in evidence in determining whether the schools in question are in fact free public schools."

After reciting the totality of evidence, summarized supra, the Court held, l.c. 584:

"From these and other facts shown by this record, we think the conclusion is inescapable that these schools, as main-

Honorable Hubert Wheeler

tained and operated by defendant District 8 and its officers at Gildehaus and Krakow, were in fact 'controlled in the main by members of recognized orders of the Roman Catholic Church and by officials thereof'; that said schools to a great degree were 'managed and administered in a manner to promote the interests and policies of the Roman Catholic Church and of adherents of the Roman Catholic faith'; and that said schools were not in fact free public schools and were not entitled to be supported by public school money or public funds. Harfst v. Hoegen, 349 Mo. 808, 163 S.W.2d 609, 141 A.L.R. 1136."

Appellants contended that the nun teachers were indispensable parties to the action because their employment relation with the public school district was determined. The Court ruled against the appellant stating, l.c. 585:

" \* \* \* The matter of the existence of any lawful or unlawful contractual relationships between the defendant districts and the teachers in the respective schools was not decisive or material to the issues on trial between the parties to this action, nor could the validity or invalidity of any such contracts constitute a defense to the plaintiffs' action."

\* \* \* \* \*

" \* \* \* The matter of the validity of contracts between the districts and the teachers has not been presented to or determined by this court. Neither the contracts nor the teachers were before this court."

Although the trial court had made statements on this issue, in light of the fact that the appeal court did not defer to the trial court's findings, in light of the fact that this issue was not presented to the court on appeal, and further in light of the fact that the court expressly said that it was not ruling upon this issue, we must conclude that the Berghorn case does not determine the question before us.

Honorable Hubert Wheeler

The sole substantial issue in Berghorn was, under the total effect of all the facts and circumstances in evidence, whether or not the schools in question were in fact free public schools. The Court concluded that they were not free public schools and therefore affirmed the trial court's orders enjoining the continuation of maintenance of these schools by the public school district.

Another case similar to Berghorn is Harfst v. Hoegen, Mo., 163 S.W.2d 609. The facts in Harfst are substantially the same as those before the Court in Berghorn. The parochial school had been under the nominal supervision of the public school board. The Court found that this was not a free public school and that the inclusion of it in the public school system where children of every faith would be compelled to attend, constituted a denial of our constitutional guarantee of freedom of religion.

The Supreme Court in Harfst also considered the actions of the teachers in the school. Article II, Section 7, Missouri Constitution 1875, the provisions of which are now contained in Article I, Section 7, of our present Constitution, states that public money cannot be used in aid of any religion or in aid of any "teacher thereof, as such." Upon the evidence, the Supreme Court found that the nun teachers had conducted religious instruction in the school in question and that they were teachers of religion as such. The Court held that under the constitutional interdiction, payment to them as teachers of religion, from the public school funds was forbidden.

Briefly stated, Berghorn and Harfst are authorities on the question of what school is lawfully a public school. Harfst further defines what subjects may be taught in a public school, that is, not religion. The question for determination in this opinion is: What person can lawfully be a teacher of secular subjects in a public school. The questions are distinct and neither Berghorn nor Harfst answers the latter. We are not aware of any Missouri case deciding this question. Our burden is one of resolving a question of first impression.

You have raised three factors and ask whether they would prevent the lawful employment of a religious or cleric by a public school district as a teacher. We shall consider each in the order presented.

(1)

Would the wearing of distinctive religious garb in the classroom prevent a person from being lawfully employed as a public schoolteacher?

We are informed that the applicant in question is not required to wear other than conventional attire in the classroom.

Honorable Hubert Wheeler

Since the question is academic here and further being without specific facts, we make no ruling upon this issue.

(2)

Would the obligation to remit wages to a religious order prevent a person from being lawfully employed as a public schoolteacher?

Employment of a public schoolteacher is a contractual relation wherein the public school district pays compensation for services rendered.

Since religion is not taught in the public school, we assume the teacher is to be hired to teach secular subjects.

Our State Constitution prohibits the use of public monies in the support of religion. See: Article I, Section 7, and Article IX, Section 8, Constitution of Missouri 1945. Our constitution also prohibits the granting of public money to any private person. See: Article III, Section 38(a) and Section 39.

Would the circumstances you describe violate these constitutional prohibitions?

The Supreme Court of our State has ruled that where there is an exchange of considerations there is not aid to religion.

In Kintzele v. City of St. Louis, Mo., 347 S.W.2d 695, the plaintiffs complained that the sale of land under the Redevelopment Law (Chapter 99, RSMo) to a private sectarian school violates the prohibitions of the State and Federal Constitutions against use of public funds in aid of religion. The Court ruled against the plaintiffs' contention, quoting a New York court, to wit, l.c. 700:

" \* \* \* '[S]ince this sale is an exchange of considerations and not a gift or subsidy, no "aid to religion" is involved and a religious corporation cannot be excluded from bidding.' \* \* \*"

Employment of a public schoolteacher is a contractual relation wherein the public school district pays compensation for services rendered. In the court's words, this is an exchange of considerations and no aid to religion is involved. Just as



Honorable Hubert Wheeler

it made no legal difference that the sectarian school would use the land purchased to promote its sectarian purposes, likewise it makes no legal difference here that a teacher give all or any part of his salary to support the church of his preference.

The disposition that the schoolteacher makes or is obliged to make of his or her income from teaching or any other source, cannot be any basis for holding that public funds are being used in aid of religion.

Therefore, it is our opinion that the obligation to remit all or any part of one's salary to a sectarian organization would not prevent such person from being lawfully employed as a public schoolteacher.

(3)

Can a person be lawfully employed as a public schoolteacher if he has taken "a religious vow which would or might be construed to require such a person to attempt to impart his religious views to students under his charge in the classroom?"

Our State Constitution prohibits the use of public monies to aid teachers of religion "as such." Article I, Section 7, Missouri Constitution 1945. Clearly, if a person in fact is employed to give religious instruction he cannot be lawfully paid for that service out of public monies and if payment is attempted the courts will enjoin it. Harfst v. Hoegen, supra, l.c. 614.

Our State Constitution further prohibits the use of public funds to provide religious education. Article IX, Section 8, Missouri Constitution 1945. Religious instruction as such in a public school is also prohibited by the First Amendment of the United States Constitution. E.g., McCullum v. Board of Education, 333 U.S. 203.

These prohibitions apply to the conduct of all persons whether they be members of religious orders, ordained ministers, laymen or atheists.

The same Constitution which guarantees religious freedom and protects a public school pupil from intrusion into his preferred religious convictions equally prohibits impairment of the right to due process of law and the freedom of speech, association, religious conviction and right to employment of the teacher.

Honorable Hubert Wheeler

One has a right to engage in lawful employment. Even as to public employments, the Constitution protects against arbitrary or discriminatory exclusion. Wieman v. Updegraff, 344 U.S. 183, 192.

It is the public policy of this State that the right to public employment be not dependent upon the applicants' religious belief.

Article I, Section 5, Missouri Constitution 1945, provides:

"That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; that no human authority can control or interfere with the rights of conscience; that no person shall, on account of his religious persuasion or belief, be rendered ineligible to any public office of trust or profit in this state, be disqualified from testifying or serving as a juror, or be molested in his person or estate; but this section shall not be construed to excuse acts of licentiousness, nor to justify practices inconsistent with the good order, peace or safety of the state, or with the rights of others."

Sections 296.010, et seq., RSMo Supp. 1965, recently enacted, prohibit discriminatory employment practices because of creed or religion. The intent of the legislature is manifest in express words. Section 296.070, states:

"The provisions of this chapter shall be construed liberally for the accomplishment of the purposes thereof, and any law inconsistent with any provision hereof shall not apply. Nothing contained in this chapter shall be deemed to repeal any of the provisions of any law of this state relating to discrimination because of race, creed, color, religion, national origin, or ancestry."

In this opinion we are called upon to determine whether a person shall be barred from employment as a public school-teacher on the basis of a religious vow. We have not been provided with the terms of a particular existent vow.

Honorable Hubert Wheeler

We are informed that the applicant seeks employment in a public school. Since the public school does not (and lawfully cannot) teach religion, necessarily he will be employed to teach some secular course as reading, writing, arithmetic, etc., with textbooks and curriculum as provided by the public school system under the supervision of the State Board of Education. A vow of a religious has no operation in the field of secular education. Thus, such a vow cannot affect the lawful employment of the person as a secular public schoolteacher.

Obviously any person, whether under a vow or not, can deviate from the authorized secular curriculum and, surreptitiously or overtly, introduce religious doctrines into a public school classroom. It is the policy of the courts not to presume from the mere possibility that persons will act unlawfully. We cannot presume any teacher will act unlawfully. Nor, can we presume that they have taken a vow which requires unlawful conduct.

If a school board employs a teacher for the purpose of teaching religion, as such, or if a teacher after employment deviates from the authorized curriculum and teaches religion as such, or if it is threatened that unlawful instruction will be given, there are adequate judicial remedies.

Therefore, we are of the opinion that in the absence of a valid statute or a judicial decree meeting due process of law requirements, a qualified person cannot be deprived of the right to employment as a public schoolteacher for having taken a religious vow.

C.

Your last question is: "Is the denial of a public schoolteacher's certificate to such a person a violation of the Civil Rights Act of 1964?"

Having found under Point A, supra, that there is no authority to refuse to issue a certification to a qualified applicant, this inquiry is moot.

CONCLUSION

Therefore, it is the opinion of this office that:

(1) Where an applicant for a public schoolteacher certificate has the required amount of academic and professional preparation as required by Section 168.021, RSMo Supp. 1965, and has presented evidence of good moral character as provided by Section 168.031,

Honorable Hubert Wheeler

RSMo Supp. 1965, the State Board of Education must issue a certificate;

(2) The legislature in prescribing the requirements for certification as a public schoolteacher has not required that the applicant be presently employable, nor has it prohibited a cleric or religious from being certificated. The State Board of Education cannot lawfully add such as prerequisites in excess of those prescribed by statute;

(3) Membership in the ordained clergy or in a religious order does not prevent a qualified person from being lawfully employed as a teacher of secular subjects in a public school;

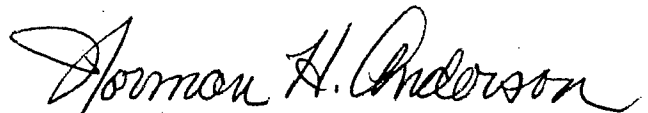
(4) An obligation to remit all or part of his salary to a religious organization or church does not prevent a qualified person from being lawfully employed as a public schoolteacher;

(5) The teaching of religion as such in the public schools by any person is prohibited;

(6) In the absence of a valid statute or judicial decree meeting requirements of due process of law, a qualified person cannot be excluded from employment as a public schoolteacher because he has taken a religious vow.

The foregoing opinion, which I hereby approve, was prepared by my assistant Louis C. DeFeo, Jr.

Yours very truly,



NORMAN H. ANDERSON  
Attorney General

Enclosure: Opinion No. 356,  
Barton, 9-22-65.

INSURANCE: Loss payable clause to mortgagee in policy insuring  
CONDOMINIUMS: condominium property is ineffective. 448.120 requires  
proceeds of policy to be paid to manager or board of  
managers.

OPINION NO. 165

December 6, 1966

Honorable Frank J. Cordes, Jr.  
Supervisor, Division of Savings and Loan  
Department of Business and Administration  
Jefferson Building  
Jefferson City, Missouri



Dear Mr. Cordes:

Reference is made to your letter requesting the official opinion of this office as follows:

"This office has been requested by the Federal Home Loan Bank of Des Moines as a supervisory matter to obtain a ruling from your office on the following problem;

Under Missouri law, a master hazard insurance policy covering the common elements and individual units of the condominium is required to be taken out by, with claims payable to, the manager or board of managers of the condominium as trustee for the individual unit owners. A letter from an attorney for an association states that the loss payable clause on the master insurance policy which is intended to protect the interest of the mortgagees of record is ineffective under Missouri law.

We will appreciate any assistance you can give us on this matter."

At our request you have furnished us with a copy of the letter from the attorney for the association referred to in your letter. The statement of the attorney which gave rise to this question is as follows:

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"The master policies will have a loss payable clause running to the mortgagees of record as their interests may appear provided that this endorsement is not in violation of the Missouri Condominium Law. As I explained, this is primarily window dressing for the examiners since both Mr. Tzinberg and myself feel that this clause is ineffective under Missouri Condominium Law."

The policy was issued by the Insurance Company of North America and bears the label "Apartment Owner's Policy." The policy states that it is "broad, simplified protection at reasonable cost to meet the modern needs of apartment owners." The policy appears to be a standard form for use by the company in issuing policies insuring apartment buildings generally. The loss payable clause in question is recited under E-Conditions, paragraph 11, Mortgagee Clause, and the relevant provisions thereof are as follows:

"Loss or damage, if any, to buildings under this policy shall be payable to the aforesaid as mortgagee (or trustee) as interest may appear \* \* \* "

The condominium concept for the ownership and use of property has developed into rather widespread application throughout this country in recent years. The term "condominium" is defined and described in 15 Am. Jur. 2d, 978 as follows:

"Both standard and legal dictionaries recognize that the term 'condominium' refers to joint ownership of real property. In recent years, however, 'condominium' has come to refer specifically to a multiunit dwelling, each of whose residents (unit owners) enjoys exclusive ownership of his individual apartment or unit, holding a fee simple title thereto, while retaining an undivided interest, as a tenant in common, in the common facilities and areas of the building and grounds which are used by all the residents of the condominium. The major characteristics of a condominium have been said to be the following: (1) individual ownership of a unit or 'apartment,' (2) an undivided interest in certain designated common elements which serve all the units in the condominium, and (3) an agreement among the unit owners regulating the administration and maintenance of the property. Consequently, the condominium has been characterized as a 'welding of



Honorable Frank J. Cordes, Jr.

two distinct tenures, one in severalty and the other in common.' It is to be distinguished from the various forms of cotenancy; in a cotenancy, ownership of the entire res is joint or in common, whereas under a condominium, ownership is joint or in common as to part of the res, but several as to other parts."

\* \* \* \* \*

This description of condominium property is consistent with the statutory provisions in regard to such property as set forth in Chapter 448 RSMo Cum. Supp. 1965. Section 448.010 (1) defines common elements; Section 448.010 (9) defines unit; and Section 448.010 (10) defines unit owner.

The question which you have raised is whether the loss payable clause intended to protect the interests of the mortgagees of record in the master insurance policy insuring condominiums is effective in this state. The master insurance policy is subject to Section 448.120 which provides as follows:

"The manager or the board of managers shall obtain insurance for the property against loss or damage by fire and such other hazards as are covered under standard extended coverage provisions for the full insurable replacement cost of the common elements and the units. Such insurance coverage shall be written in the name of, and the proceeds thereof shall be payable to, the manager or of the board of managers, as trustee for each of the unit owners in the percentages established in the declaration. Premiums for the insurance shall be common expenses."

Thus, the cited statute requires that the proceeds of such insurance coverage shall be payable to the manager or board of managers as trustee for the unit owners. The disposition of such insurance proceeds by the trustee is provided for by Sections 448.130 and 448.140. Pursuant to the cited sections, the insurance proceeds must be applied to restoration of the building to substantially the same condition in which it existed prior to the loss or damage. It is further provided that if the insurance proceeds are insufficient to reconstruct the building, and if all parties of interest do not voluntarily make provision for reconstruction within 180 days from the date of damage, the property may become a tenancy in common owned by the unit owners and subject to an action for partition. In the event of partition, Section 448.140 (4) provides in part as follows:

Honorable Frank J. Cordes, Jr.

" \* \* \* the net proceeds of sale, together with the net proceeds of the insurance on the property, if any, shall be considered as one fund and shall be divided among all the unit owners . . . after first paying out of the respective shares of the unit owners, to the extent sufficient for the purpose, all liens on the undivided interest in the property owned by each unit owner."

Thus, the statutory scheme in regard to insurance for condominiums and the disposition of such insurance proceeds is designed to protect all of the owners interested in the condominium as well as mortgagees who have an interest in the condominium.


It is appropriate to comment that the condominium concept of property ownership is a unique concept and that the drafting of policies to insure interests in the condominium may require unique concepts in insurance contracts. The policy which gave rise to the question before this office appears to be a standard apartment owner's policy. The standard apartment owner's policy may not be the most efficacious insurance instrument for the protection of interests in condominium property. It is not the function of this office to offer suggestions as to the mechanics of contract draftsmanship that may be appropriate for particular purposes. However, no irreconcilable conflict is apparent in affording adequate protection of the interests of mortgagees in condominiums and in the statutory provisions applicable to insurance for condominiums.

#### CONCLUSION

The provision of Section 448.120, RSMo Cum. Supp. 1965, that the proceeds of insurance covering the common elements and the units of condominium property shall be payable to the manager or the board of managers is as a matter of law included in the insurance policy, and the insurance company must pay the proceeds of the policy pursuant to this statutory provision. Therefore, a clause in the insurance policy providing that loss or damage shall be payable to the mortgagee is ineffective.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Thomas J. Downey.

Yours very truly,

  
NORMAN H. ANDERSON  
Attorney General

OPINION NO. 166  
Answered by Letter-Denman

May 3, 1966



Honorable Bob F. Griffin  
Prosecuting Attorney  
Clinton County  
223 East Third Street  
Cameron, Missouri

Dear Mr. Griffin:

This is in answer to your request for an opinion of this office concerning the proper fine for a person who has obtained a permit from the State Highway Department to haul an overweight load upon the highways of this state and is found to be carrying a load in excess of that granted by the permit. Specifically the question is whether the fine imposed pursuant to Section 304.240, RSMo., should be based upon the excess weight over the statutory limit or over that limit authorized by the permit.

It is our understanding that this request was prompted by a pending charge for an overweight violation under these circumstances where an information has been filed charging the offender with carrying excess weight in an amount over the statutory limit.

It is the policy of this office not to issue an official opinion on a legal question in a pending case. However, we feel that the state should take the position that the violator in question should be fined for the overweight in excess of that authorized by statute rather than by the permit.

Honorable Bob F. Griffin

It is our understanding that when an applicant wishes to obtain an **overweight** or **overdimension** permit, he delivers an application to the State Highway Department, and on the application requests the exceptions desired. Permits are not granted on loads that are severable; that is, if a portion of the load can be removed to reduce its weight or dimension, no permit is granted. The permit provides that it is invalid if the load is readily reducible either in dimension or weight.

The permit also provides:

"Any misrepresentation in the application for this permit and any attempted operation not made in strict compliance with this permit and in compliance with the laws of Missouri or of the United States, except as specifically exempted herein, is unlawful and renders this permit void. Permits voided by violation must be surrendered to an officer or employee of the commission." (Emphasis Added)

Since Section 304.200, RSMo., states that the State Highway Department may issue special permits, we feel that this authority is discretionary, and those seeking and obtaining such a permit must do so under its terms. Since the Department has specifically stated that the permit becomes voided if its provisions are violated, the permit of any person who carries a load in excess of the weight authorized by the permit becomes void, and the fine should be based upon that amount of weight in excess of the statutory limit.

We were informed by Mr. Hyder, Chief Counsel for the Highway Commission, that this interpretation consistently has been followed by the Commission and the Highway Patrol and been upheld by various magistrate and circuit courts throughout the state. However, we have not received the style or court of any specific such cases.

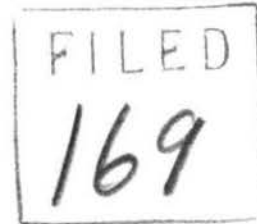
Very truly yours,

NORMAN H. ANDERSON  
Attorney General

JHD:cw

April 20, 1966

OPINION NO. 169  
Answered by Letter-Denman



Honorable Thomas A. David  
Director of Revenue  
Jefferson Building  
Jefferson City, Missouri

Dear Mr. David:

This is in answer to your request for an opinion of this office as to whether an arrest for driving a motor vehicle while intoxicated in violation of Section 564.440, RSMo. Supp. 1965, constitutes an arrest which would justify the administration of a chemical test of the breath of the driver under Section 564.441, RSMo. Supp. 1965, and the revocation of his license if he refuses to take the test under such circumstances. Section 564.444, RSMo. Supp. 1965.

You refer to the case of Sappington vs. David in the Circuit Court of Jackson County, Missouri, No. 673629, in which Judge Randall set aside a revocation of the license of Mr. Sappington under Section 564.444 because he was arrested for driving a motor vehicle while in an intoxicated condition. This ruling was appealed by the state and pending a final decision by the Supreme Court of this State, we do not feel it advisable for this office to render a formal opinion on the question.

Until a decision is rendered, we feel that the Director of Revenue should take the position that a person arrested for driving while intoxicated may be required to take a chemical breath test and, if he refuses, his license should be revoked.

Honorable Thomas A. David

In your letter you also stated that an assistant prosecuting attorney of Jackson County has requested us to brief the question of the constitutionality of the chemical breath statutes in Sections 564.441-564.444, RSMo. Supp. 1965. While we are pleased to assist the various prosecuting attorneys throughout the state on legal questions of public importance, it is not our policy to prepare legal briefs for a prosecuting attorney. However, the statutes in question have been declared unconstitutional by a circuit judge in at least one other case which has been appealed to the Supreme Court of Missouri, and we will send Mr. Schollars a copy of our brief on this question when it is prepared.

Very truly yours,

NORMAN H. ANDERSON  
Attorney General

JHD:cw



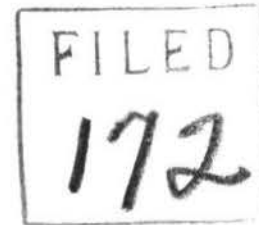
CHARITIES:  
CORPORATIONS:  
NOT FOR PROFIT CORPORATIONS:  
NURSING HOMES:  
PROPERTY TAX:  
PROPERTY TAX EXEMPTION:  
TAXATION-EXEMPTION:

The property of a private non-profit corporation organized to provide low rent housing for the aged is not exempt from real and personal property taxes under Section 137.100, RSMo, if the rentals exceed the operating and maintenance costs of the corporation.

OPINION NO. 172

March 17, 1966

Honorable Floyd E. Lawson  
Prosecuting Attorney  
Monroe County  
Paris, Missouri



Dear Mr. Lawson:

This is in answer to your request for an opinion of this office as to whether the property of Madison Community Housing, Inc., is exempt from taxation as property held for charitable purposes. The structure and purpose of the corporation is set out in your letter as follows:

"\* \* \* The development is to be built and operated by Madison Community Housing, Inc., which is incorporated under the General Not for Profit Corporation Act of Missouri. \* \* \*

"The corporation presently plans to construct twelve housing units in Madison, Missouri. The construction will be financed by FHA funds, with the corporation giving a deed of trust securing the loan.

"The purpose of the construction is to provide low cost rental housing for senior citizens in the low income ranges. \* \* \* The rental from the project will be used to amortize the loan and to pay operational expenses. No part of the income may accrue to the benefit of any private individual. Applicants for the rental housing must be at least sixty-two years of age and must have an income not in excess of the

Honorable Floyd E. Lawson

maximum income which will be set by the county FHA committee.

"The project is aimed at those persons on the old age pension rolls and recipients of Social Security who are financially unable to provide adequate housing for themselves, however, individuals with private sources of income will not be excluded so long as they fall below the maximum income level.

"After the mortgage indebtedness has been retired, title to the property will be conveyed, as a gift, to the City of Madison, Missouri."

It appears that at its inception, most, if not all of the assets of the corporation, will be the money which it proposes to borrow. This will be used as capital for housing construction. The primary source of revenue will be the rent paid for the use of these houses. In order to repay the interest and principal on its indebtedness, the corporation must charge as rentals an amount over and above the operating costs of the corporation. Thus it appears that at the inception of the corporation, it will have little or no equity in the assets. As principal payments are made on the loan out of funds received for purveying its service, the equity of the corporation in its assets will constantly increase.

Article X, Section 6 of the Constitution of Missouri exempts from taxation all property of the state, county and other political subdivisions. Obviously, this corporation is not a political subdivision. It is simply a private corporation. The mere fact that after a mortgage indebtedness has been retired it is contemplated that title to the property will be conveyed as a gift to the city of Madison, has no bearing upon the situation. The question is whether the property is presently exempt prior to the time title thereto may vest in the city. Until such eventual vesting in the city of Madison, the property is owned and operated by a private corporation and is not therefore automatically exempt from taxation.

Section 6, Article X of the Constitution, further authorizes the Legislature to enact general laws exempting from taxation "all property, real and personal, not held for private

Honorable Floyd E. Lawson

or corporate profit and using exclusively . . . for property purely charitable.\* \* \*." (Emphasis ours) Section 137.100, RSMo, implements the quoted portion of the Constitution.

It is our opinion under the facts submitted that the property of Madison Community Housing, Inc., is and will be held for private or corporate profit within the meaning of Section 6, Article X and Section 137.100, RSMo, and for that reason such property is not exempt from taxation. Under the facts submitted, the corporation is to be so operated that the charges will not only take care of all operating and maintenance costs, but will be in an amount sufficient to reduce the corporate indebtedness and to enable the corporation to acquire valuable assets debt free. In *City of Newport News v. Warwick County*, 159 Va. 571, 166 SE 570, 1.c. 578-579, the court said:

"It also appears manifest that reduction of the indebtedness against the property by payment of the principal of the bonds outstanding out of the earnings can only be regarded as profit."

In *Williams v. Town of Morristown*, 32 Tenn. App. 274, 222 SW2d 607, 1.c. 612, it was said:

"So, the operation of a water works system by a municipality for 'profit' means the system is being conducted on a commercial basis for revenue and not as a governmental enterprise out of public funds for the common good."

There are many definitions of the term "profit", too numerous to set forth in this opinion, some of which may be found in Volume 34, Words and Phrases, Permanent Edition. However, under any applicable definition, there can be no question but that an operation such as is here proposed, wherein the revenue to be received will be far in excess of the costs of operation and maintenance, necessarily results in profit. That the profit is being used to acquire and pay for a housing development which is being used to house the aged is of no consequence and does not alter either the essential profit-making nature of the operation or the fact that the operation is conducted on a commercial basis for revenue.

Honorable Floyd E. Lawson

That the incorporators and members of Madison Community Housing, Inc., are prohibited by its Articles of Incorporation from receiving any part of the income or property of the corporation by way of dividend or otherwise (except as compensation for services rendered) does not mean that the property is not held for corporate profit. The Constitution and statute do not require that the profit be received by the members of the corporation. It is sufficient only that the corporation hold the property for profit in order to exclude such property from the benefit of the tax exemption. In our opinion, the corporation's purpose is to derive a profit from the property. It follows that if the corporation is operated as set forth in the documents submitted by you, its property will be held for corporate profit.

We have not overlooked the fact that Madison Community Housing, Inc., was organized as a not-for-profit corporation under Chapter 355. In determining whether the property of the corporation is exempt from taxation, neither the Articles of Incorporation, the charter issued to such corporation, nor the statute under which it obtained its charter governs the ultimate decision. See Celina and Mercer County Telephone Co. v. Union-Center Mutual Telephone Association, 102 Ohio 487, 133 N.E. 540. The true test is not its charter, but the character of its business, its method of conducting such business and the actual purpose for which the property is held and used.

The case cited in your letter, Bader Realty & Investment Co. v. St. Louis Housing Authority, Mo. Banc, 217 SW2d 489, is not applicable as the housing corporation was a public rather than a private corporation.

#### CONCLUSION

The property of a private non-profit corporation organized to provide low rent housing for the aged is not exempt from real and personal property taxes under Section 137.100, RSMo, if the rentals exceed the operating and maintenance costs of the corporation.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. John H. Denman.

Yours very truly,

  
NORMAN H. ANDERSON  
Attorney General

CHARITIES:  
SCHOLARSHIP FUND:  
SCHOOLS:  
STATUTORY CONSTRUCTION:  
TAXATION: EXEMPTIONS  
          SALES-USE TAX

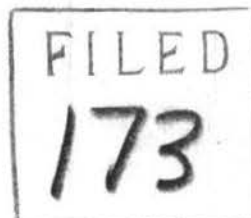
The phrase "supported by public funds or by religious organizations as used in Section 144.040, RSMo, modifies only "educational institutions" and a religious, charitable or eleemosynary institution may be exempt from payment of sales and use taxes even though they are supported entirely by private funds.

Thus the John J. Dwyer Funds, Inc., an organization incorporated to provide scholarships to worthy students using funds donated by private persons or firms, is exempt as a charitable organization from the payment of sales and use taxes under Section 144.040, RSMo.

October 11, 1966

OPINION NO. 173

Honorable Thomas A. David  
Director of Department of Revenue  
State of Missouri  
Jefferson City, Missouri



Dear Mr. David:

This is in answer to your request for an opinion of this office as to whether the John J. Dwyer Fund, Inc., is exempt from sales and use taxes. It is my understanding that this corporation was organized as a not-for-profit corporation under Chapter 355, RSMo, to give college scholarship to deserving people.

The corporation, sometimes referred to as the "Fund", requested an exemption as a charitable or eleemosynary institution within the meaning of Section 144.040, RSMo, which reads as follows:

"In addition to the exemptions under section 144.030 there shall also be exempted from the provisions of sections 144.010 to 144.510 all sales made by or to religious, charitable, eleemosynary institutions, penal institutions and industries operated by the department of penal institutions or educational institutions supported by public funds or by religious organizations, in the conduct of the regular religious, charitable, eleemosynary, penal or educational functions and activities, and all sales made by or to a state relief agency in the exercise of relief functions and activities."



Honorable Thomas A. David

This request was tentatively denied by the Department of Revenue on the basis that the Fund was not an organization supported by public funds or by a religious organization. This denial was premised on a long standing interpretation of Section 144.040 by the Department that the qualifying phrase, "supported by public funds or by religious organizations", modifies each of the preceding elements; that is, to secure an exemption from the sales and use tax provisions, a religious, charitable or eleemosynary institution or a penal institution or an industry operated by the department of penal institutions must also be supported by public funds or by religious organizations.

The information we have received indicates that the "Fund" was organized for the purpose of receiving donations and expending the sums received to provide higher educational opportunities to worthy students through partial or total scholarships at accredited colleges or universities located within the State of Missouri.

It has generally been held that gifts for schools and scholars and for educational purposes are regarded as charitable in nature. 14 C.J.S. Charities, Section 15, p. 444, Bogdanovich v. Bogdanovich, 360 Mo. 753, 230 S.W.2d 695; Burrier v. Jones, 338 Mo. 679, 92 S.W.2d 885. Therefore, for purposes of this opinion, we will assume the John J. Dwyer Fund, Inc., to be a charitable institution.

Hence the question to be determined is whether a charitable (or religious or eleemosynary) institution supported by private donations rather than by public funds or by religious organizations may be granted an exemption from sales and use tax under the provisions of Section 144.040.

While making this determination, we are mindful that the provision in question is an exempting statute which must be strictly construed against the taxpayer, although such construction should not force a conclusion that the legislative intent was other than a reasonable construction of the language used in the circumstances shows it to be. *Hern v. Carpenter*, Mo. Sup., 312 S.W.2d 823. *Frisco Emp. Hospital Ass'n v. State Tax Commission of Missouri*, Mo. Sup., 381 S.W.2d 772. This rule applies even though the exemption is claimed as a charitable organization. *Bethesda General Hospital v. State Tax Commission*, Mo. Sup., 396 S.W.2d 631; *Y.M.C.A. v. Sestric*, 362 Mo. 551, 242 S.W.2d 497; *Salvation Army v. Hoehn*, 354 Mo. 107, 188 S.W.2d 826.

We are also mindful of the rule that where there is doubt and ambiguity as to the meaning of a statute, the construction given by the officers charged with its administration shall be considered to determine its meaning. *England v. Eckley*, Mo. Sup., 330 S.W.2d 738, 744; *Rathjen v. Reorganized School District R-II of Shelby County*, 365 Mo. 518, 284 S.W.2d 516; *Wiley v. Stewart Sand & Material Co.*, Mo. App., 206 S.W.2d 362.



Honorable Thomas A. David

If construed in accordance with strict grammatical exactitude, the phrase "supported by public funds or by religious organizations" could be held to modify "religious, charitable, eleemosynary institutions". This would result from applying the general rule that "when a conjunction connects two coordinate clauses or phrases, a comma should precede the conjunction if it is intended to prevent following qualifying phrases from modifying the clause which precedes the conjunction." Application of Graham, 199 S.W.2d 68, 74-75; In re Perkins, 234 Mo. App. 716, 117 S.W.2d 686.

However, in the interpretation of statutes, the punctuation thereof should not be decisive. It is a minor element in the interpretation of a statute and if the intent of the legislature is reasonably clear, errors in punctuation may be disregarded. State ex rel. Geaslin v. Walker, Mo. Sup., 257 S.W. 470; State ex rel. and to Use of Tadlock v. Mooneyham, Mo. App., 253 S.W. 1098; 50 Am. Jur., Statutes, Section 253.

In our opinion, a strict construction of Section 144.040 under the rule of the Graham and Perkins cases would not correctly reflect the intention of the legislature to provide a tax exemption to the type of institutions named in the statute. State tax exemptions are given in return for the performance of functions which benefit the public. Exemptions in favor of charitable institutions are based upon the premise that a benefit is conferred upon the public by them, with consequent relief, to some extent, of the burden imposed upon the state to care for and advance the interests of its citizens. Bethesda General Hospital v. State Tax Commission, supra, 1.c. 633, 634.

The charitable function which furnishes the reason for the exemption may be carried on as well by an institution supported by private donations as those supported either by public funds or religious organizations. This philosophy is expressed in Section 137.100 which implements Article X, Section 6, of our Missouri Constitution 1945, which exempts from property taxes all property not held for private or corporate profit and used for purposes purely charitable. We do not feel that the legislature, by omitting the comma preceding the word "or" in Section 144.040, intended to deny the traditional exemption provided to the many worthy charities supported by private donations.

This interpretation of the legislative intent may be supported by a consideration of the statute itself. A careful reading of Section 144.040 indicates that only educational institutions were required to be supported by public funds or by religious organizations.

The modifying phrase, "supported by public funds or by religious organizations" would be meaningless if construed to qualify "penal institutions and industries operated by penal institutions" as penal institutions are operated as public institutions and thus

Honorable Thomas A. David

by necessity are supported by public funds. The same objection applies to construing this phrase to qualify "religious \* \* \* institutions". Generally it would be unconstitutional to support a religious institution with public funds and a requirement that a religious institution, to be exempt from sales and use tax must be supported by a religious organization, would result in a meaningless redundancy.

The use of the word "institutions" throughout the statute seems to divide such "institutions" into separate classes of exemptions and thus would prevent the phrase "supported by public funds or religious organizations" from referring back any further than the preceding class of institution, the educational institution. It might be noted that while religious, charitable and penal institutions in practice are normally non-profit institutions, and charitable in nature, many private educational institutions are non-charitable, profit making organizations. There is, therefore, a practical need for the qualifying phrase limiting the exemption granted educational institutions.

In the opinion of this office, the exemptions granted by Section 144.040 are divided into three classifications: 1) religious, charitable and eleemosynary institutions; 2) penal institutions and industries operated by the department of penal institutions; and 3) educational institutions supported by public funds or by religious organizations. This classification would be in keeping with the traditional method of tax exemption which we believe is what was intended by the legislature.

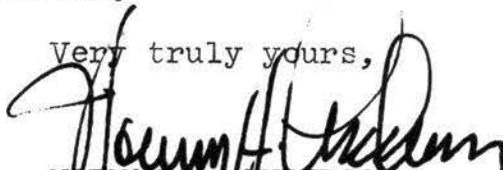
#### CONCLUSION

In our opinion, the phrase "supported by public funds or by religious organizations" as used in Section 144.040, RSMo, modifies only "educational institutions" and a religious, charitable or eleemosynary institution may be exempt from payment of sales and use taxes even though they are supported entirely by private funds.

Thus the John J. Dwyer, Inc., an organization incorporated to provide scholarships to worthy students using funds donated by private persons or firms, is exempt as a charitable organization from the payment of sales and use taxes under Section 144.040, RSMo.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John H. Denman.

Very truly yours,

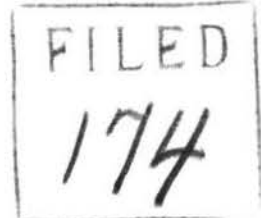


NORMAN H. ANDERSON  
Attorney General

Opinion No. 174  
Answered By Letter  
(Ashby)

February 17, 1966

Mr. Joseph Jaeger, Jr.  
Executive Secretary  
State Inter-Agency Council For  
Outdoor Recreation  
Capitol Building  
Jefferson City, Missouri 65102



Dear Mr. Jaeger:

Reference is made to the recent inquiry by the Bureau of Outdoor Recreation of the United States Department of Interior as to what constitutes satisfactory evidence of title in Missouri for state agencies and political subdivisions.

The State Comptroller will certify for payment a warrant drawn on the State Treasury for the purchase of land for the State of Missouri where the following has been accomplished:

1. A warranty deed has been executed to the state and duly filed.
2. An abstract showing merchantable title is in fact in the state or a certificate of title insurance in an acceptable title insurance company.
3. An opinion by the Attorney General of Missouri that merchantable title in fact has vested in the state.

Political subdivisions have their separate requirements but it is substantially the same procedure which we have set forth above. However, as political subdivisions are separate entities with each having their own procedures, we can not give a further detailed statement as to their requirements than this general statement.

Yours very truly,

NORMAN H. ANDERSON  
Attorney General

RCA:mm

ELECTIONS: Election precincts in the City of St. Louis may be  
PRECINCTS: established according to the number of registered  
voters rather than the population of an area.

OPINION NO. 175

March 2, 1966

Mr. Francis M. O'Brien, Secretary  
Board of Election Commissioners  
1111 Title Guaranty Building  
706 Chestnut Street  
St. Louis, Missouri 63101



Dear Mr. O'Brien:

Reference is made to your letter of February 4, 1966, wherein you requested a formal opinion from this office as follows:

"That the Board of Election Commissioners also has the statutory duty to establish precincts of not more than 700 voters.

Now, considering the duties and responsibilities of the Board of Election Commissioners in the light of the foregoing, is the St. Louis Board of Election Commissioners to establish and equalize election precincts by considering only registered voters in such establishment, or are we required under the Supreme Court edict to establish and equalize precincts on the basis of population, and of this matter we require an opinion."

It is assumed that the "Supreme Court edict" to which you refer in your opinion request is the so-called "one man--one vote" principle enunciated by the Supreme Court of the United States in a series of cases in recent years. Baker v. Carr, 369 US 186 (1962); Wesberry v. Sanders, 376 US 1 (1964); and Reynolds v. Simms, 377 US 533 (1964) are landmark decisions by the United States Supreme Court which hold that districts for representatives in the Congress of the United States and legislative districts for both houses of state legislatures must be substantially equal in population. Other cases have arisen throughout the country in regard to the application of the principles announced in these landmark cases to districts of local governmental entities, such as the board of aldermen of municipalities and districts making up county governments. No opinions by the Supreme Court have been written as of this date applying the "one man--one vote" principle to local governmental units. However, some decisions by United States District Courts have held that the principle does apply to local governmental units.

Mr. Francis M. O'Brien

The Board of Election Commissioners of the City of St. Louis is required by law to establish election precincts pursuant to Sections 118.150, 118.153, and 118.156, RSMo 1959. Since all election precincts in the City of St. Louis use voting machines, the following provision of Section 118.153 (2) is applicable to the question you have raised:

"2. Every election precinct established for the use of voting machines shall be composed of compact and contiguous territory and shall not contain in excess of approximately seven hundred voters. The election authority shall regard ward lines where such lines exist, but otherwise may revise, subdivide or rearrange any precinct or precincts at any time it may deem necessary."

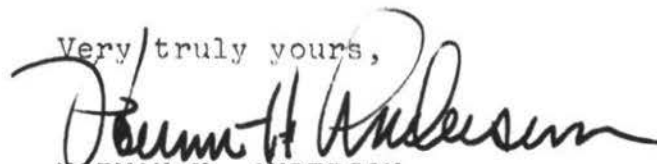
It will be noted that the cited statute provides for the establishment of election precincts containing not in excess of seven hundred voters. No reference is made to the population of a precinct as such. It is also noted that no governmental functions are assigned to precincts. Precincts are established for the convenience of conducting elections. The convenience of conducting elections may be affected by the number of voters casting ballots at any particular place. The population of a precinct enters into the convenience of conducting elections only insofar as the number of voters may be reflected by such population. However, the number of registered voters in any particular place may be a more accurate measure of the necessity for voting accommodations than the population of the area itself.

#### CONCLUSION

It is the opinion of this office that the Board of Election Commissioners of the City of St. Louis is required by law to establish precincts to contain not in excess of approximately seven hundred voters. In dividing areas into precincts of approximately seven hundred voters, the Board of Election Commissioners may consider only the registered voters in such area.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Thomas J. Downey.

Very truly yours,



NORMAN H. ANDERSON  
Attorney General



NEPOTISM: School director causing appointment of  
PUBLIC OFFICERS: relative violates constitutional nepotism  
SCHOOLS: provision. Violator forfeits his office,  
but may not be prosecuted.

May 31, 1966

OPINION NO. 177

Honorable Don E. Burrell  
Prosecuting Attorney  
Greene County  
Springfield, Missouri



Dear Mr. Burrell:

We are in receipt of your opinion request of February 7, 1966. Your request is as follows:

"Please be so kind as to give me the opinion of your office construing Sections 168.101 and 162.091, found in the 1965 supplement of the Missouri statutes.

"I have a situation where the Chairman of a school Board has employed a school bus driver who, is related to him in a 'one-half' relationship degree both by consanguinity and affinity in the third degree. My question is whether or not Section 168.101 will apply to school bus drivers or whether or not it only applies to teachers; and two, whether or not the 'half' relationship is enough to come under Section 168.101 if that Section does apply to bus drivers and other employees as well as teachers.

"In order to make this matter more plain, I am enclosing a diagram of the relationship involved.



Honorable Don E. Burrell

"I call upon your office for an opinion in this matter because Section 162.091 makes the violation of this Section we are talking about, a misdemeanor, and I am trying to make a determination whether or not I will prosecute on this matter."

You state in your letter and in the attached diagram, that Wayne Butler is president of the board of a school district and that he has employed Jesse Mooneyham as a bus driver for that district. Your diagram shows that James Monroe Mooneyham is a common ancestor to both of these men; that James Monroe Mooneyham was married twice, and that his first marriage resulted in the birth of a daughter, Mirita Mooneyham, who later became Mirita Mooneyham Butler; that Mirita Mooneyham Butler was the mother of Wayne Butler, the man in question.

Born of James Monroe Mooneyham's second marriage was Jesse Mooneyham, the other man in question. Thus, it would seem that the mother of Wayne Butler, Mirita Mooneyham Butler, and Jesse Mooneyham, are half-brothers and sisters, so that Jesse Mooneyham is the uncle of Wayne Butler.

Section 168.101 Cum. Supp. 1965, provides:

" \* \* \* The board shall not employ one of its members as a teacher; nor shall any person be employed as a teacher who is related within the fourth degree to any board member, either by consanguinity or affinity, where the vote of the board member is necessary to the selection of the person; \* \* \*"

It is to be noted that this section refers only to "teachers" and we do not believe that by its terms it would be broad enough to cover the employment of a bus driver.

But Article VII, Section 6, of the Constitution of Missouri, of 1945, provides:

"Any public officer or employee in this state who by virtue of his office or employment names or appoints to public office or employment any relative within the fourth degree, by consanguinity or affinity, shall thereby forfeit his office or employment."

Honorable Don E. Burrell

The case of State ex rel. vs. Whittle, 63 S.W. 2d 100, Mo. holds that a school director is a public officer as pertains to this section of the Constitution. Further, Article VII, Section 6, states that any employee who, by virtue of his office or employment employs any relative within the fourth degree of consanguinity shall forfeit his office or employment. Under the terms of this provision of the Constitution, Wayne Butler, the president of the board of the school district being the nephew of Jesse Mooneyham, is prohibited from employing the said Jesse Mooneyham as a bus driver for the school district because the said Jesse Mooneyham is within the fourth degree of consanguinity.

The question as to whether or not the relationship is one of half blood, is immaterial, insofar as the nepotism provision of the Constitution is concerned, and we enclose an opinion rendered by this office under date of May 12, 1942, to Honorable Thomas G. Woolsey, which so holds.

Section 162.091, Mo. Cum. Supp. 1965, provides that any school board member who willfully neglects or refuses to perform any duty imposed upon him by chapters 160 to 168, 170, 171, and 177 to 179, RSMo, or who violates any provision of these chapters is guilty of a misdemeanor and upon conviction shall be punished by a fine or imprisonment in the county jail.

This section of the statute provides for penalty only for violations of duties imposed by the named chapters, and does not provide any punishment under the constitutional provision against nepotism. Consequently it is our opinion that the president of the school board could not be punished under this section of the statute.

It is our opinion, however, that due to the violation of the provisions of Article VII, Section 6, of the Constitution of Missouri, as set out herein, he would forfeit his office.

We are also enclosing a copy of an opinion of this office to Honorable James T. Riley, dated May 15, 1953, which opinion is applicable to the subject matter discussed herein.

#### CONCLUSION

By reason of the authorities quoted herein, it is the opinion of this office that a member of a school board, who votes for the employment of a relative as a school bus driver, when

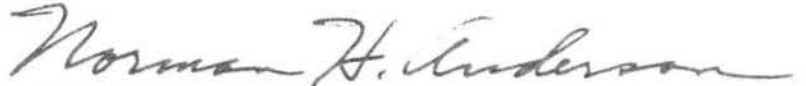
Honorable Don E. Burrell

said relative is within the fourth degree of consanguinity, violates the constitutional nepotism provision.

Further, that the member of the school board could not be prosecuted for having made such appointment, but that the violator forfeits his right to the office which he holds.

The foregoing opinion which I hereby approve was prepared by my assistant, O. Hampton Stevens.

Yours very truly,

A handwritten signature in cursive script, reading "Norman H. Anderson".

NORMAN H. ANDERSON  
Attorney General

Encl:

Opinion dated May 12, 1942, to Hon. Thomas G. Woolsey;  
Opinion No. 75, dated May 15, 1953, to Hon. James T. Riley.

SCHOOL DISTRICTS: Sections 162.211(3) and 162.221 et seq., RSMo. Supp. 1965, are applicable to six-director school districts of St. Louis County, and 25 voters of such districts may petition for the establishment of a six-director district which combines adjacent districts.

OPINION NO. 180

April 14, 1966

Honorable Maurice Schechter  
State Senator, 13th District  
41 Country Fair Lane  
Creve Coeur 41, Missouri



Dear Senator Schechter:

This official opinion of the Attorney General is issued in response to your request.

You ask, "whether 25 voters may petition for a consolidation of adjoining school districts in St. Louis County."

Section 162.211, RSMo. Supp. 1965, provides:

"A six-director school district may be established by the voters of

(1) Any common school district which contains a city or town;

(2) Any city or town which is divided by a school district boundary line and which is not located in a county of the first class;

(3) Any two or more adjacent six-director districts without limitations as to size or enrollment; or

(4) Any common school district which has two hundred or more children of school age by the last enumeration or any two or more adjacent common school districts which together have an area of fifty square miles or have an enumeration of at least two hundred children of school age."

Section 162.221 provides:

"1. When the voters of any one or more districts as authorized in section 162.211 desire to form a six-director district, a petition signed by at least twenty-five voters of the

district or districts shall be filed with the county superintendent of schools. On receipt of the petition the county superintendent shall visit the districts and investigate the needs of the area and determine the exact boundaries of the proposed six-director district. In determining these boundaries, he shall so locate the boundary lines as will in his judgment form the best possible six-director district, having due regard also to the welfare of adjoining districts.

"2. Within thirty days after the receipt of the petition, the county superintendent shall call an election of the voters of the proposed district by posting three notices in public places in each district affected by the proposal stating the time, place and purpose of the election together with a plat of the proposed district at least fifteen days before the election and shall also publish the notice two times in at least one newspaper in the county or counties, the first publication to be at least fifteen days before and the last publication to be made not less than seven days before the election. The county superintendent shall file a copy of the petition and of the plat with the county clerk. The election shall be conducted in the manner provided in section 162.191 except that the county superintendent shall perform all duties and have all powers imposed on or vested in the county board of education by that section. The costs of holding the election shall be paid as provided in section 162.191.

"3. If the proposed six-director district includes territory lying in two or more counties, the petition shall be filed with the county superintendent of that county which contains the part of the proposed district having the highest assessed valuation, and the district, if created, belongs to that county. The county superintendent shall proceed as above set forth and in addition shall file a copy of the petition and of the plat with the county clerk of each county from which territory is proposed to be taken, except that all plats and notices posted shall be signed by the county superintendent of all counties in which any part of the proposed district lies. If any county

Honorable Maurice Schechter

superintendent fails or refuses to sign all plats and notices as required in this section, the case may be appealed to the state board of education by any other county superintendent interested, and the decision of the state board shall be final."

St. Louis County being a county of the first class, subsection (2), of Section 162.211, quoted supra, does not apply.

You inform us that all school districts in St. Louis County are six-director districts. Accordingly, subsections (1) and (4) of Section 162.211 have no present application.

Subsection (3), of Section 162.211, however, is applicable to six-director districts.

Section 160.011(12), RSMo. Supp. 1965, defines six-director districts as follows:

"'Six-director district' means any school district which has six directors and includes urban districts;"

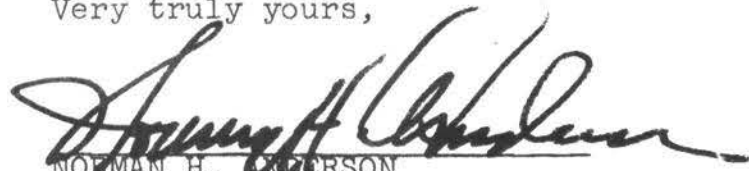
We are not aware of any statute excepting the school districts of St. Louis County from either the definition "six-director districts" or the provisions of Section 162.211.

#### CONCLUSION

Therefore, it is the opinion of this office that Sections 162.211(3) and 162.221 et seq., RSMo. Supp. 1965, are applicable to six-director school districts of St. Louis County and that 25 voters of such districts may petition for the establishment of a six-director district which combines adjacent districts.

The foregoing opinion, which I hereby approve, was prepared by my assistant Louis C. DeFeo, Jr.

Very truly yours,

  
NORMAN H. ANDERSON  
Attorney General



February 25, 1966

OPINION NO. 181  
Answered by Letter  
Randolph

Honorable James L. Paul  
Prosecuting Attorney  
McDonald County  
Pineville, Missouri 64856



Dear Mr. Paul:

This letter is in answer to your request for an opinion of this office which you have stated as follows:

"Under the provisions of Section 137.565 RSMo., does each common road district within a county have to present a petition to the County Court with ten or more qualified voters and taxpayers for each common road district; or may the general common road district submit a general petition so long as ten or more voters and taxpayers of the total number of common road districts qualify?"

Section 137.565, RSMo., reads:

"Whenever ten or more qualified voters and taxpayers residing in any general or special road district in any county in this state shall petition the county court of the county in which such district is located, asking that such court call an election in such district for the purpose of voting for or against the levy of the tax provided for in the second sentence of the first paragraph of section 12 of article X of the Constitution of Missouri, it shall be the duty of the county court, upon the filing of such petition, to call such election forthwith to be held within twenty days from the date of filing such petition. The petition so filed shall set out the duration of the tax to be levied in a period

Honorable James L. Paul

of one, two, three or four years and the ballot to be used for voting shall specify the number of years duration of the tax levy, but in no event shall the duration of the tax levy be for a period of more than fourtyears. Such call shall be made by an order entered of record setting forth the date and place of holding such election, the manner of voting and the rate of tax the court will levy, which rate shall not exceed thirty-five cents on the hundred dollars assessed valuation on all taxable real and tangible personal property in the district. A copy of such order shall be published in two successive issues of any newspaper published in such district, if any, and if no newspaper is published in such district, three certified copies of such order shall be posted in public places in such district. The first publication in said newspaper and the posting of such notice shall be not less than ten days before the date of such election. Such court shall also select one or more judges and clerks for such election to receive the ballots and record the names of the voters."

The Supreme Court of Missouri, in construing similar provisions of former statutes, from which our present statute is taken, said, State ex rel and to use of Moore v. Wabash R. Co., 208 S.W.2d 223,226:

"[2] 'Road district' has a distinct connotation and understanding in the law. It is but an agency or subdivision of the state created by law to aid in the administration of that general function which concerns highways. 29 C.J.S., Highways, §145.

"Upon a complete examination of the constitutional sections and of the statutes enacted pursuant thereto beginning in 1909, it appears there is nothing in any language used, any procedure prescribed or any purpose indicated which points to any different intended use of the words 'road district', than that in which they are commonly understood and accepted. Certainly the words are not synonymous with township. There may be a number of general road districts within a township. A special road district

Honorable James L. Paul

would conceivably embrace much more than an entire township. We can reach no other conclusion than that Section 23 was adopted, and carried forward into the second sentence of Section 12 for the specific purpose of permitting the people in such a 'road district' to vote the second additional tax upon themselves for road purposes should that be their desire."

It is clear that the statute contemplates separate action of individual road districts which are to decide separately whether they desire an election on the levy provided in the second sentence of the first paragraph of Section 12 of Article X, of the Constitution of Missouri.

Answering your question directly, therefore, we think that pursuant to Section 137.565 RSMo., each common road district that desires such an election must present a petition to the county court signed by 10 or more qualified voters and taxpayers within such district; and that a general petition on behalf of more than one common road district for such purpose would not qualify under the statute.

Yours very truly,

NORMAN H. ANDERSON  
Attorney General

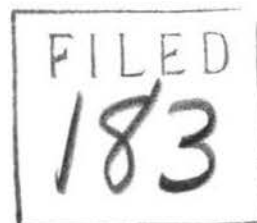
CORONERS:  
PROSECUTING ATTORNEYS:  
PHOTOGRAPHS:  
COUNTY BUDGET:

(1) The Coroner of a 3rd class county, a photographer, could not be paid out of county funds, as a coroner for photographs taken at the scene of a crime;  
(2) the Prosecuting Attorney is authorized to spend whatever is necessary in preparation of cases for trial subject to budget provisions of statutes.

OPINION NO. 183

June 28, 1966

Honorable Bill D. Burlison  
Prosecuting Attorney  
Cape Girardeau County  
Cape Girardeau, Missouri 63701



Dear Mr. Burlison:

We are in receipt of your opinion request of February 12, 1966, which is as follows:

"The Coroner of Cape Girardeau County is a professional photographer. At my request, he takes photos in the course of his investigations, when he feels there is a reasonable probability of a crime having been committed.

"My office hereby formally requests your opinion on the following questions, to-wit:

"1. Is the coroner entitled to receive from the County his normal professional compensation for the services thus rendered?

"2. If the answer to the above question is "No", is the Coroner entitled to his reasonable expenses in providing this service?

"These questions presumably will require interpretation of the pertinent sections of Chapter 58, Missouri Revised Statutes."

We find nothing in the statutes authorizing a coroner of a third class county to charge for the pictures he takes at the scene of a crime.

Honorable Bill D. Burlison

Section 58.110 Laws of 1961, provides that a coroner in a county of a third class, having a population of over 30,000 is to receive a salary of \$1200.00 annually. Section 58.120 provides that he may receive 10 cents a mile for each mile necessarily traveled in the performance of his duties.

You state that the present coroner is a professional photographer and **that** he takes pictures at your request, in the course of his investigations.

It would appear to us that these are extremely helpful to you in your investigation, as prosecutor, and we see no reason why the expense of these pictures would not be a legitimate charge of your office.

We are attaching official opinions issued under date of January 23, 1947, to James L. Paul, and August 7, 1951, to R. M. Gifford, which hold that the Prosecuting Attorney may be reimbursed for necessary expenses in investigation of crimes.

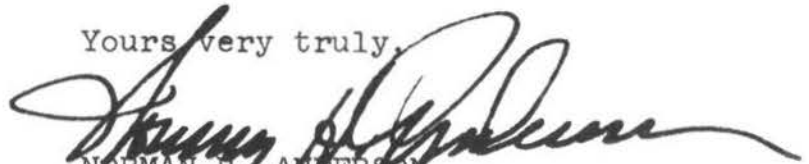
It is our opinion that the Prosecuting Attorney would have a right to expend public funds if the amount was budgeted, and necessary for him to properly prepare a case for trial.

#### CONCLUSION

It is the opinion of this office that the coroner of a third class county, a professional photographer, could not be paid out of county funds as a coroner for photographs taken at the scene of a crime, and secondly, the Prosecuting Attorney is authorized to spend whatever amount is necessary, of public funds, in preparing cases for trial, which is one of the specific functions of his office, subject, however, to the budgetary provisions of the statutes.

The foregoing opinion, which I hereby approve was prepared by my Assistant, O. Hampton Stevens.

Yours very truly,

  
NORMAN H. ANDERSON  
Attorney General

TAKATION: Nonresident servicemen stationed in Missouri  
SERVICEMEN: are not liable for personal property taxes on  
PERSONAL PROPERTY: personal property they bring with them. Resi-  
MILITARY SERVICE: dent servicemen are responsible for personal  
RESIDENTS: property taxes whether such tangible personal  
NONRESIDENTS: property is located in the state or out of state.

OPINION NO. 184

July 28, 1966

Honorable Richard J. Blanck  
Prosecuting Attorney  
Cooper County  
Boonville, Missouri



Dear Mr. Blanck:

This opinion is in response to your request wherein you submitted the following questions:

"1. Is personal property located in this County on the 1st of January and owned by a member of the Armed Forces, stationed in the County, subject to personal property tax?"

"2. Is personal property not located in this County on the 1st of January but owned by a member of the Armed Forces who claims Cooper County, Missouri, as his residence and domicile but is presently stationed outside the County and State, subject to personal property tax?"

Your first question must be determined having in mind the fact whether such serviceman is a resident or nonresident.

If the serviceman is a nonresident, your first question is answered in the negative. We have so held in our Opinion Attorney General No. 95, dated February 16, 1966, addressed to the Hon. Don E. Burrell, Prosecuting Attorney of Greene County. A copy of that opinion is attached.

If we assume the serviceman is a resident of Missouri, the first question would be answered in the affirmative. See our



Honorable Richard J. Blanck

Opinion Attorney General No. 318, dated June 28, 1966, addressed to the Hon. Roy Carver. A copy of this opinion is also attached.

A caveat is noted that this Opinion No. 318 (supra) is subject, in its operation, to the provisions of Section 137.090, RSMo Supp. 1965, which reads as follows:

"All tangible personal property of whatever nature and character situate in a county other than the one in which the owner resides shall be assessed in the county where the owner resides, except that houseboats, cabin cruisers and automobile trailer houses used for lodging shall be assessed in the county where they are located and tangible personal property belonging to estates, which shall be assessed in the county in which the probate court has jurisdiction; provided, that no tangible personal property shall be simultaneously assessed in more than one county."

The above statute defines what county has jurisdiction to impose its taxes insofar as particular kinds of personal property are concerned. As this statute seems clear, we will not belabor this issue further.

We assume for the purposes of answering your second question that the taxing entity involved here is Cooper County. Inasmuch as the question does not specify whether the tangible personal property is located in Cooper County or accompanied the serviceman to an assignment out of the State of Missouri on a temporary basis, we shall consider the question in its broader aspects.

If the tangible personal property is located in Missouri, our Opinion Attorney General No. 318 (supra) holds that the serviceman is responsible to the appropriate taxing entities where such tax is properly levied.

If the tangible personal property accompanied the serviceman and he is outside the State of Missouri pursuant to military orders, the serviceman still must fulfill his obligation as a citizen of this state. This tax liability has been considered by the United States Supreme Court in *Dameron v. Brodhead*, 345 U.S. 322 1.c. 326, 73 S.Ct. 721, 97 L. Ed. 1041, where the Court said:

"\* \* \*In fact, though the evils of potential multiple taxation may have given rise to this

provision, Congress appears to have chosen the broader technique of the statute carefully, freeing servicemen from both income and property taxes imposed by any state by virtue of their presence there as a result of military orders. It saved the sole right of taxation to the state of original residence whether or not that state exercised the right.\* \* \*

This view was recently reaffirmed by that court in California v. Buzard, 382 U.S. 386, 86 S.Ct. 478, 15 L. Ed.2d 436.

We find nothing in the statute or in case law that exempts a serviceman of the obligation of a citizen. However onerous, the payment of taxes to the appropriate taxing entities constitutes an obligation, like others, that a serviceman must fulfill. We believe this view is in consonance with the cited cases decided by the United States Supreme Court. See also, United States v. Arlington County Commonwealth of Virginia, (CA), 326 Fed.2d 929.

On the facts of this case, it is evident that the serviceman is a resident of Missouri; that he is stationed only temporarily in another state pursuant to military orders and his tangible personal property (which accompanied him) is only temporarily in such other state or place during his period of service there.

Applying the common law doctrine of "Mobilier Sequuntur Personam" (see Smith v. Ajax Pipe Line Co. 87 Fed.2d 567, 569), we are of the opinion that the power to tax the tangible personal properties of the serviceman temporarily located in another state would follow such resident serviceman.

Accordingly, we conclude the permanent situs of such tangible personal property would be in the domiciliary state and the county of the residence of such serviceman. By virtue of the above common law doctrine, we believe a resident serviceman is obligated to pay taxes on his tangible personal property which accompanies him even though such property may be outside the state.

#### CONCLUSION

It is the opinion of this office that:

1. Nonresident military personnel who bring personal property temporarily into this state pursuant to their military duty are not subject to a personal property tax by any taxing

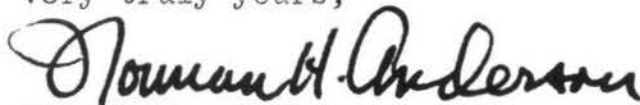
Honorable Richard J. Blanck

entity of this state.

2. Resident military personnel, although not physically present in the state and county and whose tangible personal property may not be within the state, are still subject to personal property taxes where levied by an appropriate taxing entity.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Richard C. Ashby.

Very truly yours,

A handwritten signature in cursive script, reading "Norman H. Anderson".

NORMAN H. ANDERSON  
Attorney General

Enclosures:

Opinion No. 93 (1953)  
Opinion No. 95 (1966)  
Opinion No. 318 (1966)

February 25, 1966

OPINION NO. 186  
Answered by Letter(Nowotny)

Honorable Haskell Holman  
State Auditor  
Capitol Building  
Jefferson City, Missouri



Dear Mr. Holman:

This is in answer to your request for an opinion on the question of whether a county judge is entitled to mileage under Section 49.110 and 49.120, RSMo Cum. Supp. 1965, when meeting with the County Board of Equalization as required by Section 138.010, RSMo Cum. Supp. 1965.

Section 49.110, supra, provides for per diem and mileage for county court judges of class three counties and Section 49.120, supra, provides for per diem and mileage for county court judges of class four counties. Each section is substantially the same and the applicable part of each section concerning mileage is identical. Therefore, we only quote Section 49.110 which reads as follows:

"In all counties of the third class the judges of the county court shall receive for their services fifteen dollars per day for each of the first ten days in any month that they are necessarily engaged in holding court and shall receive ten dollars per day for each additional day in any month that they are necessarily engaged in holding court, and shall receive

Honorable Haskell Holman

ten cents per mile for each mile necessarily traveled in going to and returning from the place of holding county court and for all other necessary travel on official business in the personal automobile of the judge presenting the claim. The per diem compensation herein fixed shall be paid at the end of each month and the mileage compensation shall be paid at the end of each month on presentation of a bill, by the respective county judge, setting forth the number of miles necessarily traveled."

Section 138.010, RSMo Cum. Supp. 1965, provides for a County Board of Equalization and reads as follows:

"1. In every county in this state, except as otherwise provided by law, there shall be a county board of equalization consisting of the judges of the county court, the county assessor, the county surveyor, and the county clerk who shall be secretary of the board without vote; except in any county having township organization, the township assessor shall sit as a member of the board of equalization when the assessment of his township is under consideration or review."

"2. This board shall meet at the office of the county clerk on the second Monday in July, 1946, and on the second Monday of July of each year thereafter."

Section 138.020, RSMo Cum. Supp. 1965, provides for compensation for members of the board and reads as follows:

"The judges of the county court, the county surveyor, the county assessor, the county clerk, and those sitting as members as may otherwise be provided, shall receive five dollars per day for each day they shall be present and act in the performance of their duties as members of the county board of equalization; provided, that the above county officers who are now or may hereafter be compensated by salary shall not be entitled to the compensation provided in this section. "

Honorable Haskell Holman

The legislature, then, specifically provides for compensation when the County Board of Equalization meets but does not specifically provide for mileage.

The legislature in Section 49.110 and 49.120, supra, specifically provides for compensation for county judges of third and fourth counties when holding court and also specifically provides for mileage. This mileage is given when traveling to and from court and for "all other necessary travel on official business".

It is our opinion that mileage is only provided for travel on official business of the county court and that travel in connection with the County Board of Equalization does not qualify for such mileage.

Yours very truly,

NORMAN H. ANDERSON  
Attorney General

WWN:cw



LOTTERIES:  
CHAIN LETTERS:

A chain letter scheme whereby a person purchases a letter for ten dollars and can possibly receive a profit of \$320 if the chain is not broken is a lottery under Section 563.430, RSMo Supp. 1965.

OPINION NO. 188

July 28, 1966

Honorable Daniel V. O'Brien  
Prosecuting Attorney  
St. Louis County  
Clayton, Missouri



Dear Mr. O'Brien:

This is in answer to your request for an opinion of this office as to whether or not a chain letter is a lottery in Missouri.

The chain letter in question reads in part as follows:

- "1. You buy this letter for ten dollars then take the five dollar check which is attached to the letter and mail it to the number-one man on the list, the one to whom the check was made out. After doing this, you cross the number-one man off the list, move everyone's name up one position, and place your name in the sixth position.
- "2. Now take this copy and make two more just like it. Make sure you don't leave out any of the steps. You now have two copies of this letter with your name in sixth position. Take the original letter and destroy it.
- "3. Take the two copies of the letter you have made and attach to each a five dollar check or money order, made out to the person at the top of your new list. Now sell the letters you have made up for ten dollars each thus breaking even. The quicker the letters are sold, the quicker your name progresses to the top of the list.
- "4. The two people to whom you sell the letter will each sell two copies of the letter with your name in the fifth position.

Honorable Daniel V. O'Brien

There will then be four people in possession of a letter on which your name has been moved to fourth place. Each of these four owners will sell two letters with your name in fourth position, and there will thus be eight new owners who have moved your name to third position, thus making sixteen owners of a letter who have moved your name to second position. These sixteen people each sell two letters with your name in second place, thus making 32 owners of a letter with your name moved to first place. These 32 owners will each sell two letters each of which bears a five dollar check to your 64 checks of five dollars each will be mailed to you and your name is crossed off the list. This will give you a profit of 320 dollars. This letter is void without an attached check."

Section 563.430, RSMo Supp. 1965, reads as follows:

"If any person shall make or establish, or aid or assist in making or establishing, any lottery, gift enterprise, policy or scheme of drawing in the nature of a lottery as a business or avocation in this state, or shall advertise or make public, or cause to be advertised or made public, by means of any newspaper, pamphlet, circular, or other written or printed notice thereof, printed or circulated in this state, any such lottery, gift enterprise, policy or scheme or drawing in the nature of a lottery, whether the same is being or is to be conducted, held or drawn within or without this state, he shall be deemed guilty of a felony, and, upon conviction, shall be punished by imprisonment in the penitentiary for not less than two nor more than five years, or by imprisonment in the county jail or workhouse for not less than six nor more than twelve months, provided, however, that this section shall apply only where there is consideration in the form of money, or its equivalent, paid to or received by the person awarding the prize."

Honorable Daniel V. O'Brien

The court en Banc in State ex inf. McKittrick v. Globe-Democrat Pub. Co., 341 Mo. 862, 110 S.W.2d 705, 713, said that "a lottery includes every scheme or device whereby anything of value is for a consideration allotted by chance", citing State v. Emerson, 318 Mo. 633, 1 S.W.2d 109, 111. The court also said, l.c. S.W.2d 713, that the elements of a lottery are prize, consideration and chance. All three must be present to constitute a lottery.

C.J.S., Lotteries, Section 2(d), says, concerning prize, that:

"In the absence of statute, anything of value offered as an inducement to participate in a scheme of chance is a prize."

There is no doubt that the element of prize is present as the chain letter states that if a person buys the letter he can hope to receive a profit of \$320 if the chain is kept intact.

As to the element of consideration, a person must first pay ten dollars just to buy the chain letter. Then after making two copies of the letter and adding his name to the list, he must attach a check or money order for five dollars to each of the copies. If this person is unable to sell these copies, the chain is broken, and his ten dollars is lost. If the copies are sold, a total of twenty dollars has been expended, but, of course, the twenty dollar outlay will have been recovered. Regardless of whether a person can or actually does recover his initial outlay, the fact remains that it cost ten dollars to enter the chain for the possibility of recouping a substantial profit. Therefore, it is our opinion that the element of consideration is present.

The leading Missouri case on the element of chance is State ex inf. McKittrick v. Globe-Democrat Pub. Co., supra. The court said, l.c. S.W.2d 713:

"\* \* \*Hence a contest may be a lottery even though skill, judgment, or research enter therein to some degree, if chance in a larger degree determine the result.\* \* \*"

And, the court said, l.c. S.W.2d 717:

"\* \* \*In other words, the rule that chance must be the dominant factor is to be taken

Honorable Daniel V. O'Brien

in a qualitative or causative sense  
rather than in a quantitative sense.\* \* \*"

We have been unable to find any Missouri cases directly on chain letters. However, similar schemes have been considered in other jurisdictions.

In Kent v. City of Chicago, 301 Ill.App. 312, 22 N.E.2d 799, an endless chain scheme was held to be a lottery. The court said, l.c. N.E.2d 802:

"\* \* \*It is apparent that the real consideration upon which the customers were persuaded to invest was that by putting in \$3 they had a chance to obtain \$768; that the business was apparently conducted in an honest way is, of course, beside the point. In essence the plan is one by which through payment of \$3 for worthless pieces of paper, there is an opportunity to win \$768.\* \* \*"

On the element of chance, the court said that since the prize which one could hope to receive depended upon the actions of others in not breaking the chain, "over whom he had no more control than he has over 'the countless laughter of the sea,'" chance was present in the legal sense.

In Public Clearing House v. Coyne, 194 U.S. 497, 24 S.Ct. 789, 48 L.Ed. 1092, another endless scheme was held to be a lottery. On the element of chance, the court said, l.c. U.S. 515:

"It is true, as urged by the counsel for complainant, that in investing money in any enterprise the investor takes the chance of small profits, or even of failure, as well as the hope of large profits; but such enterprises contemplate the personal exertions of the investor, or of his partners, agents or employees, while in the present case his profits depend principally upon the exertions of others, over whom he has no control and with whom he has no connection. It is in this sense the amount realized is determinable by chance."

Honorable Daniel V. O'Brien

In New v. Tribond Sales Corporation, 19 Fed.2d 671, the court held that an endless chain scheme for the sale of hosiery was a lottery and said, l.c. 674:

"It is apparent, we think, from what we have said, that whether a 'contract' holder will get his hosiery for an investment of \$1, \$5, \$8, or \$10, depends upon contingencies largely beyond his control. First, there is the requirement that the three 'respective purchasers' to whom he sells the three coupons will in turn remit \$3 each to the corporation for three other 'contracts.' These coupon purchasers may, upon inquiry, ascertain that others are trying to sell coupons, and they may, for this or some other reason satisfactory to them, conclude to forfeit the \$1 paid for the coupon and abandon the scheme. Obviously this is a matter beyond the control of the original 'receipt holder,' and, as to him, a matter of chance. Another circumstance is that those who embark upon the scheme at its inception have a better chance to earn a prize than those who take it up later. Although this element of chance is not as pronounced as that in the first instance, it may be present."

See also Niccoli v. McClelland, 21 Cal. App. 2d Supp. 759, 65 P.2d 853, where a chain letter scheme was held to be a lottery.

In the scheme under consideration the ultimate gain received by the person purchasing the chain letter is determined not by his own skill but on factors over which he has no control. To him it is a matter of chance that he will receive a profit of \$320 or any amount of profit.

Therefore, it is our opinion that the chain letter scheme you inquire about is a lottery under Section 563.430, RSMo Supp. 1965.

#### CONCLUSION

It is the opinion of this office that a chain letter scheme whereby a person purchases a letter for ten dollars and can possibly receive a profit of \$320 if the chain is not broken is a lottery under Section 563.430, RSMo Supp. 1965.

Honorable Daniel V. O'Brien

The foregoing opinion, which I hereby approve, was prepared  
by my assistant, Walter W. Nowotny, Jr.

Yours very truly

A handwritten signature in dark ink, appearing to read "Norman H. Anderson", written in a cursive style.

NORMAN H. ANDERSON  
Attorney General



PEACE OFFICER: Within the context of Section 557.215, RSMo  
CONSERVATION AGENT: 1965 Cum. Supp., making it a felony to assault  
ASSAULT: a "peace officer" while in the performance of  
his duties, the term "peace officer" includes  
agents of the conservation commission and deputy  
boat commissioners.

Opinion No. 189

May 26, 1966

Honorable Harold S. Hutchison  
Prosecuting Attorney  
Maries County  
Vienna, Missouri



Dear Mr. Hutchison:

This is in response to your recent request for an opinion  
as follows:

"I would like an opinion from your office  
on your interpretation of Section 557.215  
L 1965 S.B. 190 on whether a conservation  
agent while in the performance of his duties  
would be classified as 'other peace officer'  
so as to make the assault a felony as pro-  
vided by the above statute."

In part the law in question provides that:

"Any person who shall willfully strike,  
beat or wound any police officer, sheriff,  
highway patrol officer or other peace  
officer while such officer is actively  
engaged in the performance of duties im-  
posed on him by law, \* \* \* is guilty of  
a crime \* \* \*."

In addition you have asked if the statute applies to  
deputy boat commissioners.

We have no statutory or clear cut case law definition of  
"peace officer" in this state. However, a universally accepted  
axiom of statutory interpretation is that general statutory lan-  
guage should be given its plain, ordinary meaning according to  
the context in which it appears, State v. Plotner, Mo., 222 S.W.  
767.

Other states have had occasion to interpret the term in  
question and those interpretations have not been uniform. They

Honorable Harold S. Hutchison

range from the most liberal, i.e., "\* \* \* 'peace officer' is an exceedingly comprehensive term, embracing public officials of practically every class and position, judges of all degrees, policemen, mayors, aldermen, etc., whether county, municipal or state representatives." Vickers v. State, Tenn., 142 S.W.2d 188; to the most restrictive, but the most generally accepted meaning of peace officer is "\* \* \* a person designated by public authority to keep the peace and arrest persons guilty or suspected of crime and he is a conservator of the peace, which term is synonymous with the term 'peace officer'." Vandiver v. Manning, Ga., 114 S.E.2d 121.

The duties imposed upon a conservation agent by law are (Section 252.080, RSMo 1959) that he shall arrest "\* \* \* any person caught by him or in his view violating or who he has good reason to believe is violating, or has violated [the conservation laws] and take such person forthwith before a magistrate or any court having jurisdiction, who shall proceed without delay to hear, try and determine the matter as in other criminal cases."

The duties imposed upon deputy boat commissioners are that they shall have "\* \* \* the power to arrest for the violation of any provision of Sections 306.010 to 306.210, (The Watercraft Regulations) \* \* \*."

Also under Section 252.080, RSMo 1959, conservation agents are given the same power to serve criminal process as sheriffs and marshalls in connection with violations of the conservation laws which confirm the legislative intent to bring them within the meaning of "peace officer".

#### CONCLUSION

Within the context of Section 557.215, RSMo 1965 Cum. Supp., making it a felony to assault a "peace officer" while in the performance of his duties, the term "peace officer" includes agents of the conservation commission and deputy boat commissioners.

The foregoing opinion which I hereby approve was prepared by my Assistant, Howard L. McFadden.

Very truly yours,

  
NORMAN H. ANDERSON  
Attorney General

COUNTY COURTS: Pursuant to Section 478.013, RSMo. Cum. Supp.  
CIRCUIT JUDGES: 1965, (1) it is mandatory that the circuit  
SALARIES: judge or judges of a judicial circuit composed  
STATUTES: of two or more counties, one of which is a  
county of the second class, shall each receive  
\$3,000 payable by the counties composing the circuit, with each  
county contributing a proportionate part thereof, determined by the  
ratio that the population that each county bears to the population  
of the entire circuit; (2) the judge or judges of a circuit composed  
of or within a single county are not entitled to receive any greater  
annual compensation than \$19,000, including such part as may be  
paid by such county.

OPINION NO. 190

April 20, 1966

Honorable Haskell Holman  
Auditor of the State of Missouri  
Capitol Building  
Jefferson City, Missouri



Dear Auditor Holman:

You have requested an official opinion of this office which  
reads in part as follows:

"This office hereby requests your official  
interpretation of the provisions of paragraph  
2 of Section 478.013 Cumulative Supplement  
1965 pertaining to the following:

(1) That portion of paragraph 2 reading  
as follows:

'Each judge of the circuit court of  
a judicial circuit which includes a  
county of the second class shall receive  
an annual salary of nineteen thousand  
dollars; sixteen thousand dollars of which  
shall be paid by the state out of the state  
treasury and three thousand dollars by the  
county or counties composing the circuit;  
the county part of the salary or salaries  
shall be divided among the counties and  
paid by them proportionately as the pop-  
ulation of such county bears to the entire  
population of the circuit \* \* \*.'

Under the above provisions, wherein a judicial circuit is  
composed of two or more counties, one of which is a county  
of the second class, is it not mandatory that the circuit  
judge or judges shall each receive three thousand dollars

Honorable Haskell Holman

payable by the counties composing the circuit with each county contributing a proportionate part thereof that would be determined by the ratio that the population of each county bears to the population of the entire circuit?

(2) That portion of paragraph 2 which reads as follows:

'If the county court of the county of which a circuit is composed so orders, each judge of that circuit shall receive an additional one thousand eight hundred dollars per annum to be paid by the county composing the circuit.'

Under the above quoted provision, would the judge or judges of a circuit or circuits composed of or within a single county, regardless of the classification or size of the county, be entitled to receive one thousand eight hundred dollars per annum in addition to the annual salary of nineteen thousand dollars if the county court of the county so orders?"

In construing statutes, words are to be given their usual and commonly understood meaning, unless it is plain from the statute that a different meaning is intended. 82 C.J.S. Statutes, Section 329, Page 639; O'Malley v. Continental Life Insurance Company, Mo., 75 S.W.2d 837; American Bridge Company v. Smith, Mo., 179 S.W.2d 12, certiorari denied, 323 U.S. 712, 65 S.Ct. 37. Further, under the general rule of express mention and implied exclusion, the express mention of one matter excludes other similar matters not mentioned; every positive direction in a statute contains an implication against everything contrary to it; the specification of one particular class excludes all other classes, and an affirmative description of powers granted implies a denial of nondescribed powers. 82 C.J.S. Statutes, Section 333, Page 668, Kroger Grocery and Baking Company v. City of St. Louis, Mo., 106 S.W.2d 435.

Applying the above rules to your inquiry, respecting question (1), whether in a judicial circuit composed of two or more counties, one of which is a second class county, the circuit judge or judges thereof shall each receive three thousand dollars annually payable by the counties composing the circuit, with each county contributing a proportionate part thereof which would be determined by the ratio that the population of each county bears to the population of the entire circuit, the answer is in the affirmative. Such is the clear, evident, unequivocal and reasonable meaning of the portion of subsection 2 of Section 478.013, supra, quoted in your question (1).

Honorable Haskell Holman

With respect to question (2), whether judges of circuits composed of or within a single county are entitled to receive \$1,800 per annum in addition to the annual salary of \$19,000 if the county court of the county so orders, the answer is in the negative. The actual statute is the bill, agreed to and finally passed by the legislature and signed by the governor, not the purported statute as it appears in the official revision. *State v. Hicks*, Mo., 142 S.W.2d 472; *Bird v. Sellers*, Mo., 26 S.W. 668.

House Bill No. 390, 73rd General Assembly, as agreed to and finally passed, reads as follows:

"Section 1. Section 478.013, RSMo. Supp. 1963 is repealed and one new section enacted in lieu thereof, to be known as section 478.013, to read as follows:

478.013. 1. Each judge of the circuit court of a judicial circuit composed of a single county or city which now has or may hereafter have more than two hundred thousand inhabitants, or judge of a judicial circuit composed of a single county within which circuit any part of a portion of a city is located, which city now has or may hereafter have more than two hundred thousand inhabitants, shall receive an annual salary of nineteen thousand dollars, sixteen thousand dollars of which shall be paid by the state out of the state treasury and three thousand dollars by the county or city composing the circuit.

2. Each judge of the circuit court of a judicial circuit composed of a single county which now has or may hereafter have more than seventy-five thousand inhabitants and less than two hundred thousand inhabitants, shall receive an annual salary of seventeen thousand two hundred dollars, sixteen thousand dollars of which shall be paid by the state out of the state treasury and one thousand two hundred dollars by the county composing the circuit. If the county court of the county of which a circuit is composed so orders, each judge of that circuit shall receive an additional one thousand eight hundred dollars per annum to be paid by the county composing the circuit.

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3. All other judges of the circuit courts of this state shall each receive an annual salary of sixteen thousand dollars payable by the state out of the state treasury. If the county courts of all of the counties composing a circuit so order, the judge of that circuit shall receive an additional three thousand dollars per annum to be paid by the counties composing the circuit. The county part of the salary shall be divided among the counties and be paid by them proportionately as the population of each county bears to the entire population of the circuit.

4. No circuit judge shall practice law or do a law business nor shall he accept, during his term of office, any public appointment or employment for which he receives compensation for his services."

Senate Substitute for House Bill No. 459, 73rd General Assembly, as agreed to and finally passed, reads as follows:

"Section 1. Section 478.013, RSMo. Supp. 1963 is repealed and one new section enacted in lieu thereof, to be known as section 478.013, to read as follows:

478.013. 1. Each judge of the circuit court of a judicial circuit composed of a single county or city which now has or may hereafter have more than one hundred twenty-five thousand inhabitants, or judge of a judicial circuit composed of a single county within which circuit any part or portion of a city is located, which city now has or may hereafter have more than two hundred thousand inhabitants, shall receive an annual salary of nineteen thousand dollars, sixteen thousand dollars of which shall be paid by the state out of the state treasury and three thousand dollars by the county or city composing the circuit.

2. Each judge of the circuit court of a judicial circuit which includes a county of the second class shall receive an annual salary of nineteen thousand dollars, sixteen thousand dollars of which shall be paid by the state out of the state treasury and three thousand dollars by the county or counties composing the circuit, the county part of the salary or salaries



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shall be divided among the counties and paid by them proportionately as the population of such county bears to the entire population of the circuit.

3. All other judges of the circuit courts of this state shall each receive an annual salary of sixteen thousand dollars payable by the state out of the state treasury. If the county courts of all of the counties composing a circuit so order, the judge of that circuit shall receive an additional three thousand dollars per annum to be paid by the counties composing the circuit, the counties contributing equal amounts.

4. No circuit judge shall practice law or do a law business nor shall he accept, during his term of office, any public appointment or employment for which he receives compensation for his services."

Section 478.013, RSMo. Cum. Supp. 1965 reads as follows:

"1. Each judge of the circuit court of a judicial circuit composed of a single county or city which now has or may hereafter have more than one hundred twenty-five thousand inhabitants, or judge of a judicial circuit composed of a single county within which circuit any part or portion of a city is located, which city now has or may hereafter have more than two hundred thousand inhabitants, shall receive an annual salary of nineteen thousand dollars, sixteen thousand dollars of which shall be paid by the state out of the state treasury and three thousand dollars by the county or city composing the circuit.

"2. Each judge of the circuit court of a judicial circuit which includes a county of the second class shall receive an annual salary of nineteen thousand dollars, sixteen thousand dollars of which shall be paid by the state out of the state treasury and three thousand dollars by the county or counties composing the circuit; the county part of the salary or salaries shall be divi-

Honorable Haskell Holman

ded among the counties and paid by them proportionately as the population of such county bears to the entire population of the circuit. If the county court of the county of which a circuit is composed so orders, each judge of that circuit shall receive an additional one thousand eight hundred dollars per annum to be paid by the county composing the circuit.

3. All other judges of the circuit courts of this state shall each receive an annual salary of sixteen thousand dollars payable by the state out of the state treasury. If the county courts of all of the counties composing a circuit so order, the judge of that circuit shall receive an additional three thousand dollars per annum to be paid by the counties composing the circuit, the counties contributing equal amounts.

4. No circuit judge shall practice law or do a law business nor shall he accept, during his term of office, any public appointment or employment for which he receives compensation for his services."

The revisor's note appended to the quoted statute, states that it consists of House Bill No. 459, supra, with the exception of the last sentence in Subsection 2, which is taken from House Bill No. 390, supra. We think that House Bill No. 459, entirely supersedes House Bill 390, and that the inclusion of a part of House Bill 390 in the revision is erroneous.

We enclose a copy of the opinion of the Attorney General (Opinions No. 388 and 390) dated November 8, 1965, addressed to Honorable Carroll M. Blackwell and Honorable Roderic R. Ashby, holding that House Bill No. 459, supra, is controlling insofar as it conflicts with House Bill No. 390, supra.

House Bill 390 provides that in single county circuits of more than 75,000 inhabitants and less than 200,000 inhabitants, each judge shall receive \$17,200, a year and, at the option of the county, an additional \$1800. This conflicts with House Bill 459. House Bill 459 provides that in single county circuits which are second class counties the salary shall be \$19,000 (subsection 2). In the case of a circuit composed of a single county of over 125,000 inhabitants or of a circuit composed of a single county which contains any part of a city of over 200,000 inhabitants the salary

Honorable Haskell Holman

shall be \$19,000 (subsection 1). In any other single county circuit, the salary is \$16,000, plus an additional \$3,000, at the option of the county (subsection 3). The last sentence of subsection 2 of Section 478.013, RSMo. Cum. Supp. 1965, taken out of context from House Bill 390, read in connection with the remainder of subsection 2 of Section 478.013, RSMo. Supp. 1965, seems to allow an additional \$1800 over and above the \$19,000, annual salary payable to a judge of a circuit court of a judicial circuit composed of a single county of the second class. This is not authorized by either House Bill 390 or House Bill 459, supra.

Both House Bill No. 459 and House Bill No. 390, supra, have the same scope; namely, the salaries of the circuit judges of the state. Therefore, insofar as the two bills do not conflict, they are identical in meaning. In other words, House Bill No. 390 adds nothing to House Bill No. 459 that is not in conflict therewith. Thus, House Bill No. 390 has no place in the statute. The statute is simply House Bill No. 459, neither more nor less. The last sentence of subsection 2 in the revision is no part of the law. House Bill 459, supra, provides that the maximum salary of a circuit judge shall be \$19,000. In the case of a circuit composed of a single county of the second class or of a single county or city having more than 125,000 inhabitants, or of a single county containing any part of a city of more than 200,000 inhabitants, each judge thereof receives \$19,000 annually, of which \$16,000 is paid by the state and \$3,000 is paid by the county or city comprising the circuit. In all other single county circuits, the salary is \$16,000 a year and, at the option of the county, an additional \$3,000.

You have not asked, we do not consider and do not pass upon the constitutionality of said Section 478.013.

#### CONCLUSION

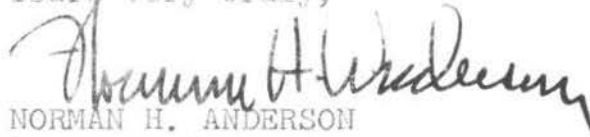
It is the opinion of the Attorney General, that, pursuant to Section 478.013, RSMo. Cum. Supp. 1965, (1) it is mandatory that the circuit judge or judges of a judicial circuit composed of two or more counties, one of which is a county of the second class, shall each receive \$19,000, of which \$16,000, shall be paid by the state and \$3,000, paid by the counties composing the circuit, with each county contributing a proportionate part thereof, determined by the ratio that the population that each county bears to the population of the entire circuit; (2) the judge or judges of a circuit composed of or within a single county are not entitled to receive

Honorable Haskell Holman

any greater annual compensation than \$19,000, including such part as may be paid by such county.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Donald L. Randolph.

Yours very truly,

  
NORMAN H. ANDERSON  
Attorney General

Enclosures (opinions):

No. 388, to Honorable Carroll M. Blackwell, 11/8/65;  
No. 390, to Roderic R. Ashby, 11/8/65.

HOSPITALS:  
HOSPITAL DISTRICTS:  
ELECTIONS:  
BONDS:

Hospital district pays election expense for election of members of hospital board and election for bond issue of district.

OPINION NO. 192

April 27, 1966

Honorable Don Owens  
Senator of 20th District  
Missouri Senate  
Gerald, Missouri



Dear Senator Owens:

This is in answer to your letter of recent date in which you request an official opinion from this office on the following question:

"Is a hospital district authorized and required to pay the election expenses incurred in elections of members of the board of directors of a hospital district and the expenses of an election to authorize a bond issue of such hospital district for construction of a hospital building?"

Chapter 206 RSMo Cum. Supp. 1965, provides for the establishment of hospital districts.

Section 206.090 RSMo Cum. Supp. 1965, provides that after the establishment of a hospital district, the determining county court (the county court which ordered the election to determine whether a hospital district should be established) shall divide the hospital district into six election districts for the election of hospital district directors and shall order an election for all six directors within ninety days after the order establishing such hospital district. Such Section also provides that the first six directors shall serve staggered terms and their successors shall serve six year terms.

Section 206.100 RSMo Cum. Supp. 1965, provides that the hospital district board of directors shall possess all of the legislative and executive powers of the district.

After a hospital district has been organized, such district shall under Section 206.110 RSMo Cum. Supp. 1965, exercise all powers incidental, necessary, convenient, or desirable to carry out and effectuate the specific powers in such section enumerated.

In the absence of any statutory provision as to the source from which election costs for district directors are to be paid (and there is no such provision) there is an obligation on the part of the hospital district to pay such costs.



Honorable Don Owens

The election of hospital district directors after the establishment of the hospital district is for the benefit of such district because such district functions only through its board of directors which under Section 206.100 is specifically granted power to exercise all of the legislative and executive power of such district.

Since such election is for the benefit of the hospital district, the cost of such election must be paid from district funds.

The power and authority to make such payment is granted to the district by the provisions of Section 206.110 because the district could not function without a board of directors and the expenditure for the election of such directors is as necessary for the carrying out of the functions of the hospital district as are the expenditures specifically authorized by Section 206.110.

Section 206.120 RSMo Cum. Supp. 1965, provides for the calling of an election by the hospital district board of directors on the question whether bonds shall be issued for the construction of hospitals. There is no specific statutory provision as to the source of the payment of expenses incurred in the holding of such an election.

The reasoning above set out concerning elections for members of a hospital district board of directors is equally applicable to an election to determine whether bonds shall be issued by the hospital district since one of the powers given by Section 206.110 to the hospital district is the power to issue bonds for accomplishing any of the district corporate purposes. Establishment and maintenance of a hospital is one of the corporate purposes of a hospital district.

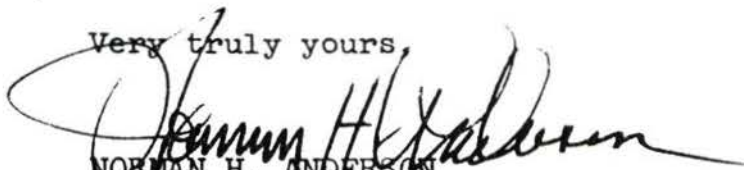
The power and authority to hold such bond election carries with it under the provisions of Section 206.110, the power and authority necessary to carry out and effectuate district purposes and authorizes the payment out of district funds of election expenses incurred in a hospital district election to determine whether bonds shall be issued by such district.

#### CONCLUSION

It is the opinion of this office that a hospital district, organized under Chapter 206 RSMo Cum. Supp. 1965, has the power, authority and obligation to pay expenses incurred in the holding of elections of members of the board of directors of the hospital district and elections to determine whether bonds shall be issued by such district for the construction of a hospital.

The foregoing opinion which I hereby approve was prepared by my assistant, Mr. C. B. Burns, Jr.

Very truly yours,

  
NORMAN H. ANDERSON  
Attorney General

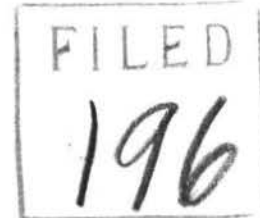


NURSING HOMES: County nursing homes, established under  
COUNTY MEMORIAL HOSPITALS: Chapter 205, are not eligible for match-  
MATCHING STATE FUNDS: ing state funds as provided in 184.290,  
because county nursing homes cannot, by  
definition, be termed county memorial  
hospitals or additions thereto.

March 28, 1966

Opinion No. 196

Mr. Gerald D. Woods  
Program Director  
Department of Public Health  
and Welfare  
State Office Building  
Jefferson City, Missouri



Dear Mr. Woods:

This is in response to your request for an official opinion of  
this office which reads in part as follows:

"This office has recently received inquiries  
as to the possibility of state financial aid  
being available to hospital districts and to  
counties for the purpose of erecting nursing  
homes under the provisions of Section 184.290,  
Revised Statutes of Missouri, 1959.

"It is requested that this office be provided  
an opinion in the matter so that we might be  
in a better position to answer such inquiries  
in the future."

Section 184.290, RSMo 1959, provides for matching funds, not to  
exceed \$10,000 from the state to be used for the purchase or estab-  
lishment and the operation of, a county memorial hospital, or a mem-  
orial addition to an existing county hospital.

Matching state funds under Section 184.290, RSMo 1959, will be  
available for the building of nursing homes only if such nursing  
homes come within the definition of county memorial hospitals, or  
memorial additions to existing county hospitals.

County nursing homes are defined by statute at Section 205.-  
375, RSMo 1959, which reads in part as follows:

" \* \* \* 'nursing home' means a facility for  
the accommodation of convalescents or other  
persons who are not acutely ill and not in  
need of hospital care, but who require skilled  
nursing care and related medical services

Mr. Gerald D. Woods

"(1) Which is operated in connection with  
a hospital \* \* \* ." (Emphasis ours)

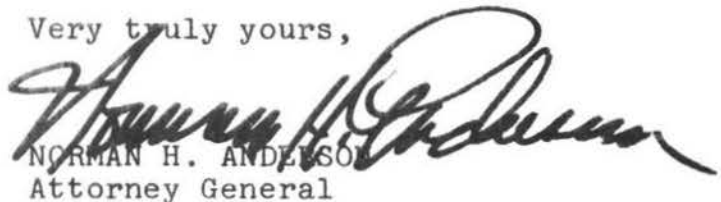
Chapter 205 also includes provisions for the establishment and maintenance of county hospitals (Sections 205.160 to 205.370) but the fact that nursing homes are separately defined and considered, indicates that the terms "hospital" and "nursing home" are not identical. Likewise the above quoted language of Section 205.375 indicates the contemplation of two separate and distinct institutions, first by stating that a nursing home is a facility for persons "not in need of hospital care", and by stating that a nursing home may be operated "in connection with a hospital" not as a hospital.

#### CONCLUSION

It is the opinion of this office that county nursing homes, established under Chapter 205, are not eligible for matching state funds as provided in 184.290, because county nursing homes cannot, by definition, be termed county memorial hospitals or additions thereto.

The foregoing opinion, which I hereby approve, was prepared by my assistant, J. Gordon Siddens.

Very truly yours,



NORMAN H. ANDERSON  
Attorney General

CHARITIES:  
NURSING HOMES:  
STATUTORY CONSTRUCTION:  
TAXATION: EXEMPTIONS  
SALES-USE TAX

The Articles of Incorporation and by-laws of Kabul Nursing Homes, Inc., would permit its being considered a charitable institution and hence exempt from imposition of sales taxes under Section 144.040, RSMo, if, as matter of fact, the operation of the home is such as to entitle it to be a charitable institution.

October 11, 1966

OPINION NO. 198

Honorable Earl L. Sponsler  
State Representative  
Texas County  
Rural Route 2  
Cabool, Missouri



Dear Representative Sponsler:

This is in answer to your request for an opinion of this office as to whether Kabul Nursing Homes, Inc., of Cabool, Missouri, is liable for Missouri sales and use tax.

It is our understanding from the letter and Articles of Incorporation enclosed in your request, that Kabul Nursing Homes, Inc., was incorporated as a not-for-profit corporation to operate a nursing home in Cabool, Missouri.

Your letter also describes the purposes of the corporation as follows:

"As you can see by the By-laws, the stated purpose of the Corporation is to operate a nursing and convalescent home in Cabool on a 'Non-Profit Plan To Care for the Aged, Infirm, Afflicted and Convalescent Regardless of Race, Color, Sex, Creed or Religious Affiliation.' More than \$30,000.00 of the cost of construction and furnishing of the Nursing Home is being provided by donations by businesses and individuals in this area. The Nursing Home will be a member of the Cabool United Fund in its next annual drive, and will receive a portion of the funds solicited in that drive. In addition, various organizations and Church groups will contribute to the operation of the Nursing Home for indigent patients.

Honorable Earl L. Sponsler

"The Nursing Home will be operated on a strictly Not-for-Profit basis, and patients will be admitted who are able to pay, as well as those who are **unable** to pay, and the charges for services rendered will be based upon the operational expense and repayment of the bonded indebtedness incurred in the construction of the Home. Of course, when this bonded indebtedness is retired, the rates charged will be substantially decreased, as it is the intention of the Corporation that no profit will be made \* \* \*."

The exemption from sales and use taxes of charitable institutions which are in fact charitable is authorized by Section 144.040, RSMo, as follows:

"In addition to the exemptions under section 144.030 there shall also be exempted from the provisions of sections 144.010 to 144.510 all sales made by or to religious, charitable, eleemosynary institutions, penal institutions and industries operated by the department of penal institutions or educational institutions supported by public funds or by religious organizations, in the conduct of the regular religious, charitable, eleemosynary, penal or educational functions and activities, and all sales made by or to a state relief agency in the exercise of relief functions and activities."

The reason for granting state tax exemptions is in return for the performance of functions which benefit the public and the exemption in favor of charitable institutions is based upon the ground that a benefit is conferred upon the public by them with consequent relief, to some extent, of the burden imposed upon the state to care for and advance the interests of its citizens. Bethesda General Hospital v. State Tax Commission, Mo. Sup., 396 S.W.2d 631 (1965); 84 C.J.S. Taxation, Section 281, p. 533; 51 Am. Jur. Taxation, Section 600, p. 583; 34 A.L.R. 635.

The maintenance of a retirement or nursing home for elderly people who have only a limited income constitutes the relief of those who otherwise might be unable to care for themselves and thus lessen the burden of care which might otherwise be imposed upon the state. If operated in purely a charitable capacity such an institution may be exempt from payment of sales or use taxes under Section 144.040.

Honorable Earl L. Sponsler

The fact that the home may not be supported by public funds or by religious organizations does not per se prevent it from being granted an exemption as a charitable institution under this section. This was our holding in Opinion numbered 173, sent to the Honorable Thomas A. David, Director of Revenue, on October 11, 1966, a copy of which we enclose herewith.

However, the charitable exemption depends not only upon the purpose of the corporation but its method of operating; whether it is in fact acting as a charitable institution. *Bethesda General Hospital v. State Tax Commission*, supra; *Young Men's Christian Association v. Sestric*, Mo. Banc., 242 S.W.2d 497 (1951); *Salvation Army v. Hoehn*, Mo. Banc., 188 S.W.2d 826 (1945). Moreover, each tax exemption case is "peculiarly one which must be decided upon its own facts". *Bethesda General Hospital v. State Tax Commission*, supra; *Midwest Bible and Missionary Institute v. Sestric*, 364 Mo. 167, 260 S.W.2d 25 (1953).

You state that patients will be admitted to Kabul Nursing Homes, Inc., who are able to pay, as well as those who are unable to pay and the charges for services rendered will be based upon the operational expense and repayment of the bonded indebtedness incurred in the construction of the Home.

The question of the tax exempt status of an organization which as part of its activities rents housing facilities to low income families has several times been considered by the Supreme Court of Missouri. See *Young Men's Christian Association of St. Louis v. Sestric*, supra; *Bader Realty & Investment Company v. St. Louis Housing Authority*, Mo. Banc., 217 S.W.2d 489 (1949); *Salvation Army v. Hoehn*, Mo. Sup., 188 S.W.2d 826 (1945). See also *Missouri Goodwill Industries v. Owner*, 357 Mo. 647, 210 S.W.2d 38 (1948) and *Northeast Osteopathic Hospital v. Keitel*, Mo. Sup., 197 S.W.2d 970 (1946).

Although the question raised in these cases concerns the charitable status of several organizations in relation to their exemption from payment of property taxes under Section 137.100, RSMo, the discussions of what constitutes a charitable institution is applicable to the question before us.

In the more recent cases, the Missouri Supreme Court has found that the tax exempt status of an organization which acts in a general charitable capacity is not lost even though the organization, in promoting its charitable purpose, leased or rented rooms to the public for money.



Honorable Earl L. Sponsler

The applicability of these cases may be questioned inasmuch as in each of them it was strongly emphasized in the Court's opinion that the operating expenses of the organization in question exceeded the income and the organization was dependent upon the receipt of additional grants, usually from the public to continue operations.

As an example of this emphasis, in Bethesda General Hospital v. State Tax Commission, supra, the court at page 633, in describing the function of the hospital, stated that it was a member of United Fund and did a tremendous amount of charity work for patients who cannot pay for care and treatment, and it has continually experienced a net loss in operating income by reason of its charitable work even after the application of endowment income.

The Court then, quoting from Bader Realty & Investment Company v. St. Louis Housing Authority, supra, defined a charitable operation in the following terms, l.c. 633:

"\* \* \* As now viewed, it comprehends activities not self supporting 'which are intended to improve the physical, mental and moral condition of the recipient and make it less likely that they will become burdens on society and more likely that they will become useful citizens.'  
(Emphasis added)

The proposed operation of the nursing home is not only self-supporting, but if the bonds are to be paid, its operations must produce sufficient income in excess of operating expenses to pay the interest and eventually the principal on such bonds.

In Young Men's Christian Association v. Sestric, supra, it was shown that for each of the three taxable years in question, the operation of its resident halls in its three branches showed an excess of income over operating expenses of \$55,214.60. (The overall operations of the organization showed a deficit of \$640,271.01 during that period, some of which was made up by allocation of community funds).

In answer to the contention that because of the profits received from the operation of the residence halls the Y.M.C.A. property was not being used "exclusively" for charitable purposes, the Court said that to determine whether an organization is operating in a charitable capacity, "the controlling consideration cannot be solely whether a profit or a loss was in fact realized or sustained."

After analyzing the fundamental purpose of the Y.M.C.A., which it found to be charitable and comparing the charitable activities of the organization with those in similar cases, the Court discussed the question of the profit making aspects of the resident halls, as follows, l.c. 505:



Honorable Earl L. Sponsler

"The YWCA, Salvation Army, and Goodwill cases granted tax exemptions because the uses made of the properties were intimately connected with the accomplishment of the purely charitable purposes of the organizations and because the uses themselves did not have for their purposes the making of profit. A distinction should be clearly made between such situations and one in which there is use of property, the purpose of which use is to make profit, even though the profit is made for the express purpose of being used, and is used, to further and accomplish a purely charitable purpose. And this is true even though the use of the property may be said to be reasonably connected with the purely charitable purposes of the corporation."

It is well known that most elderly people have some income from various state and federal programs of public assistance. It is not unreasonable that a home designed to provide shelter and medical assistance to such persons charge for these services at a rate commensurate with the patient's ability to pay. Such charges could be made in furtherance with the general charitable purpose of the home. For the reasons given in the cases previously cited, especially *Young Men's Christian Association v. Sestric*, supra, we believe that fact that Kabul Nursing Homes, Inc., intends to charge many of its patients does not in itself forfeit its right to a charitable exemption under Section 144.040.

However, to sustain its tax-exempt status as a charitable institution under this section, the Home must operate along those principles set out in the above cases, and its managers must remain cognizant of the fact that the purpose of the Home is to aid the elderly rather than to take in sufficient funds to pay the bonds.

As a guide to those factors which determine whether an institution is acting in a charitable capacity, we enclose herewith Opinion No. 43, issued February 12, 1959, to the Honorable C. M. Hulen, Jr., Prosecuting Attorney of Randolph County, in which we discussed the status of the Community Memorial Hospital at Moberly regarding liability for property taxes. In this opinion discussing the "factual" determinations to be considered we stated:

Honorable Earl L. Sponsler

"The appellate courts of this state have held that the fact that a hospital derives part of its revenue from paying patients does not exclude it from the benefits of the constitutional exemption from taxation, (See State ex rel. v. Powers, 10 Mo. App. 263, affirmed 74 Mo. 476), if the hospital were equally available to those who could not pay and if the income were used in furtherance of the charitable purposes. Northeast Osteopathic Hospital v. Keitel, 197 S.W.2d 970, 975.

"We wish to call attention to the fact that cases in other jurisdictions have held that a hospital loses its character as a charitable institution if it receives pay patients to such an extent as would exhaust its accommodations and prevent its receiving and extending hospital service to the usual and ordinary number of indigent patients applying for admission. 10 Am. Jur., Charities, Section 135, pp. 685 and 686. This rule would seem to be in accord with the views expressed in the Northeast Osteopathic Hospital case, 1.c. 975, supra, to the effect that pay patients are admitted for treatment would not make the hospital less charitable if the hospital were 'equally' available to those who could not pay.

"It has also been held in this state that the exemption from taxation depends not alone upon the purposes for which the organization is organized but is also dependent upon the actual use of the property. See Salvation Army v. Hoehn, 188 S.W.2d 826, 828. \* \* \*"

In our opinion these same considerations apply equally to Kabul Nursing Homes, Inc., and whether or not Kabul Nursing Homes, Inc., will in actual operation be a charitable institution presents a factual question upon which we cannot express a legal opinion.

#### CONCLUSION


It is the opinion of this office that the Articles of Incorporation and by-laws of Kabul Nursing Homes, Inc., would permit its being considered a charitable institution and hence exempt from

Honorable Earl L. Sponsler

imposition of sales taxes under Section 144.040, RSMo, if, as matter of fact, the operation of the home is such as to entitle it to be a charitable institution.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John H. Denman.

Very truly yours,

  
NORMAN H. ANDERSON  
Attorney General

Enclosures (opinions):

No. 173, to David, 10/11/66  
No. 43, to Hulen, 2/12/59

SURPLUS COMMODITIES PROGRAM: Carter County is entitled to  
DIVISION OF WELFARE: reimbursement by the Division of  
Welfare for 50% of the sums ex-  
pended by the county under the  
Surplus Agricultural Commodities Program, and that the fact the  
county may be reimbursed for part or all of the remaining 50%  
of the sums expended from Federal funds under the Economic  
Opportunity Act, does not abrogate their right to reimbursement  
by the Division of Welfare under Section 205.960, RSMo. Supp. 1965.

OPINION NO. 199

March 22, 1966

Honorable J. S. Allen  
State Representative  
Carter County  
Van Buren, Missouri



Dear Representative Allen:

This official opinion is issued in response to your  
request for a ruling of this office.

Your letter informs us that Carter County has a program  
for the acquisition, storage and disposition of surplus agri-  
cultural commodities; that the county has entered into an agree-  
ment with the Division of Welfare, Department of Public Health  
and Welfare, State of Missouri, for reimbursement of 50% of the  
sums expended by the county; that this agreement has been in  
operation since July 2, 1963; and was made under the provisions  
of Section 205.960, RSMo. Supp. 1965. You further inform that  
the county has obtained assistance from the local Economic  
Opportunity corporation for this program. You have also advised  
us by telephone that the county issues county warrants for 100% of  
the cost of this program and that after so paying the cost, seeks  
reimbursement - 50% from the Division of Welfare and 50% from  
the Economic Opportunity corporation.

Your letter also states that on February 17, 1966, you  
were notified by the Director of the Division of Welfare that  
reimbursement by the division would cease as of March 1, 1966.  
We have conferred with the Division of Welfare and have been advised  
that the reason for their termination is that 50% of the cost of  
the program is reimbursed by Economic Opportunity and that it is

Honorable J. S. Allen

their interpretation of Section 205.960, that counties are only entitled to reimbursement by the State where the source of the sum expended by the county is local tax revenue.

Section 205.960(3), provides:

"The division of welfare of the department of public health and welfare shall, on or about the fifteenth day of each month, reimburse any county or city not within a county in an amount equal to fifty per cent of the sum expended by the county or city for the acquisition, warehousing and necessary cold storage, safekeeping, maintenance of proper records, issuance of food stamps and distribution of surplus agricultural commodities during the preceding month; provided the expenditures have been approved by the division of welfare." (Emphasis added)

It is the policy of the courts that a statute for the welfare and relief of the needy citizens of this State be construed liberally in favor of the beneficiaries.

Nothing in this section expressly requires that in order to be entitled to reimbursement by the State that the sums expended by the county be derived solely from county tax revenues. Regardless of the source from which a county receives funds, so long as those funds are expended by the county pursuant to this program the county is entitled to the 50% State reimbursement. We need not rely solely on this conclusion here because the cost of the program is paid for from county funds. As we are informed of the facts here, the county, by warrant, pays 100% of the cost of the program. This is an expenditure of county funds. It does not cease to be an expenditure merely because it is reimbursed. Under the statute the State reimburses 50% of the expenditure. This reimbursement obviously does not cause the paying out by the county to cease to be an expenditure. If it did, the statute would be circular absurdity. Likewise, the fact that the county may be subsequently reimbursed by grants under the Economic Opportunity Act does not cause the paying out of the costs of this program to cease to be an expenditure by the county.

Had the legislature intended to limit participation in this program solely to where the source of the sums expended is tax revenue, or intended to prohibit reimbursement to the county from Federal or other sources, this intent could have been easily expressed. The term "expended" simply means paid out. This Carter County has done.

Honorable J. S. Allen

It is our opinion this is the sole requirement of the statute; namely, that the costs of the program be fixed by the payment of a sum certain by the county. Once this sum is certain and has been paid out by the county, the statute is mandatory that the Division of Welfare "shall . . . reimburse."

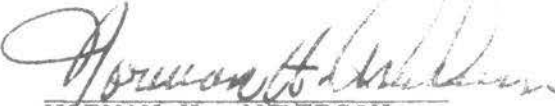
Section 205.960, provides that the Director of the Division of Welfare shall make and promulgate necessary and reasonable regulations for the administration of these programs. It is a basic rule of administrative law that rules and regulations cannot exceed or contradict the prescriptions of the statutes under which they are made. 73 C.J.S., Public Administrative Bodies, § 94. Since, in our opinion, this statute does not require that the source of the sum of money expended by the county be solely tax revenue nor prohibit reimbursement from Federal or other sources, it is further our opinion that any regulation attempting to add this requirement to the statute would be an attempt at administrative legislation and therefore unlawful.

#### CONCLUSION

Therefore, it is the opinion of this office that Carter County is entitled to reimbursement by the Division of Welfare for 50% of the sums expended by the county under the Surplus Agricultural Commodities Program, and that the fact the county may be reimbursed for part or all of the remaining 50% of the sums expended from Federal funds under the Economic Opportunity Act, does not abrogate their right to reimbursement by the Division of Welfare under Section 205.960, RSMo. Supp. 1965.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Louis C. DeFeo, Jr.

Yours very truly,

  
NORMAN H. ANDERSON  
Attorney General



COUNTY SUPERINTENDENTS: Where the county superintendent is  
COUNTY BOARD OF EDUCATION: incapacitated or the office is vacant,  
SCHOOLS: then it is the duty of the county  
board of education, pursuant to Section  
162.161(6), RSMo Supp. 1965, to designate  
some person to perform the duties im-  
posed by Section 168.051, RSMo Supp. 1965, on the office of county  
superintendent; and that all fees collected under Section 168.051  
are to be disposed of and accounted for as therein provided.

OPINION NO. 201

August 30, 1966

Honorable Haskell Holman  
State Auditor  
Jefferson City, Missouri



Dear Mr. Holman:

This opinion is issued in response to your request for an official ruling.

Your question relates to the disposition of fees collected by a county superintendent of schools under Section 168.051, RSMo Supp. 1965. You inquire as follows:

"What disposition is to be made of such funds that were in the hands of a superintendent of schools at the terminal date of his or her tenure in office when no successor was appointed or subsequently elected?

"In the event the individual who was accountable for such funds at the termination of his or her tenure in office cannot be contacted, who would be authorized to pay over or transfer said funds to the proper recipient?"

We note that your question relates to the situation where the office of county superintendent exists but there is no present person occupying that office, i.e., the office is vacant.

Section 162.161(6), RSMo Supp. 1965, provides for the situation where the office of county superintendent is vacant in the following manner:

Honorable Haskell Holman

"The county board of education shall

\* \* \* \* \*


"(6) Designate some person to perform the duties imposed by law on the county superintendent of public schools during any vacancy in his office or in the event of his incapacity to perform his duties. The person designated during the vacancy or incapacity of the county superintendent shall have full power to perform the duties imposed upon him by the county board of education."

CONCLUSION

Therefore, it is the opinion of this office that where the county superintendent is incapacitated or the office is vacant, then it is the duty of the county board of education pursuant to Section 162.161(6), RSMo Supp. 1965, to designate some person to perform the duties imposed by Section 168.051, RSMo Supp. 1965, on the office of county superintendent; and that all fees collected under Section 168.051 are to be disposed of and accounted for as therein provided.

The foregoing opinion, which I hereby approve, was prepared by my assistant Louis C. DeFeo, Jr.

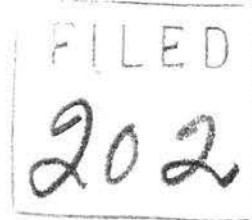
Yours very truly,

  
NORMAN H. ANDERSON  
Attorney General

FENCES: A farm owner cannot require the state or a  
STATES: county to share the cost of building fences  
COUNTIES: pursuant to the fencing statutes.  
STATUTES:

March 17, 1966

OPINION NO. 202



Honorable Clyde F. Portell  
Representative of Ste. Genevieve County  
Missouri House of Representatives  
276 St. Gerard  
Ste. Genevieve, Missouri

Dear Representative Portell:

This is in answer to your request for an opinion of this office concerning House Bill No. 286 of the 73rd General Assembly. You inquire whether said statute applies to the State of Missouri or to counties, enabling a farm owner to require reimbursement from the state or county for one-half the cost of construction of a fence erected between land owned by the state or county and that of the farm owner.

House Bill No. 286, 73rd General Assembly is Section 272.210, 272.220, 272.235, 272.240 and 272.290, RSMo, Cum. Supp. 1965. These statutes read as follows:

"272.210. As used in sections 272.210 to 272.370 the following words and terms have the following meanings:

(1) 'Lawful fence', a fence with not less than four boards per four feet of height; said boards to be spaced no farther apart than twice the width of the boards used fastened in or to substantial posts not more than twelve feet apart with one stay, or a fence or four barbed wires supported by posts not more than fifteen feet apart with one stay or twelve feet apart with no stays, or any fence which is at least equivalent to the types of fences described herein;

(2) 'Stay', a vertical member attached to each board or wire comprising the horizontal members of the fence;

"272.220. All fields and enclosures in which live-stock are kept or placed shall be enclosed by a lawful fence.



"272.235. If there is a need for a fence by either of two joining land owners both shall be obligated to build and maintain a fence under the provisions of sections 272.210 to 272.370. Nothing in sections 272.210 to 272.370 shall prevent joining land owners from agreeing that no fence is needed between their property.

"272.240. Whenever the owner of real estate desires to erect or construct a lawful fence which wholly or partially borders the land of another, he shall notify the other owner that he desires a division fence. If within ninety days after receiving the notice, the other land owner has not erected or constructed one-half of the division fence, the owner desiring the fence may apply to the magistrate court for an order to proceed with the construction and ordering the other land owner to pay one-half the value of so much thereof, as borders his land, and upon the payment shall own an undivided one-half of the fence; except that no owner shall be required to pay more than one-half the value of a lawful fence of four barbed wires, regardless of the type fence constructed. The magistrate court costs shall be taxed against the other land owner.

"272.290. Whenever the fence of any owner of real estate now erected or constructed, or which shall hereafter be erected, constructed or rebuilt the same being thereafter a fence designed to restrain swine, sheep or other animals requiring special fences, borders the land of another or which becomes a part of the fence bordering the land of another and is used to enclose such animals owned by the other person, on demand made by the person owning the fence, the other person shall pay the owner one-half of the value of so much thereof as borders his land, and upon the payment shall own an undivided half of the fence; except that no owner shall be required to pay more than the amount which would have been required to erect, construct or rebuild a lawful fence of four barbed wires on his one-half of the fence."

The state, its subdivisions and agencies are not to be considered as within the purview of a statute, unless an intention to include them is clearly manifested, especially where prerogatives, rights, titles or interests of the state would be divested or diminished or liabilities imposed upon it. *Hayes v. City of Kansas City, Mo.*, 241 S.W.2d 888; *State ex rel. Askew v. Kopp, Mo.*, 330 S.W.2d 882.

Honorable Clyde F. Portell

Page 3

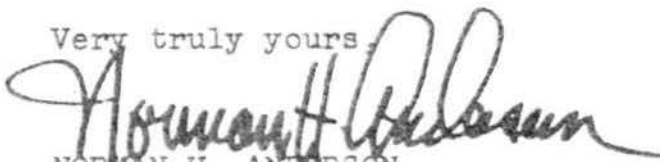
The above quoted statutes do not manifest an intention to include the state or counties within their purview.

#### CONCLUSION

We therefore conclude that a farm owner cannot require the state or a county to share the cost of building fences pursuant to the fencing statutes.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Donald L. Randolph.

Very truly yours,

A handwritten signature in dark ink, appearing to read "Norman H. Anderson". The signature is fluid and cursive, with the first name "Norman" being the most prominent part.

NORMAN H. ANDERSON  
Attorney General

ELECTIONS: CONGRESSIONAL DISTRICTS  
CONGRESSIONAL DISTRICTS: PRECINCTS  
PRECINCTS: CONGRESSIONAL DISTRICTS

Composition of Congressional Districts is determined by precincts existing on date designated by congressional districting statutes.

March 28, 1966

Opinion No. 204

Honorable Frank M. Karsten  
First District, Missouri  
United States House of Representatives  
House Office Building  
Washington, D.C. 20515



Dear Congressman Karsten:

Reference is made to your letter of February 18, 1966, seeking an interpretation by this office of Senate Bill #320, enacted by the 73rd General Assembly. The cited law divides the State of Missouri into ten congressional districts and describes the boundaries of said districts. Your inquiry is directed as to which precincts of Florissant Township, St. Louis County, are in the first district and which precincts of said township are in the ninth district.

Senate Bill #320, Section 128.212, describes the first district as including the following precincts of Florissant Township, St. Louis County: 1, 2, 3, 4, 5, 19, 22, 23, 24, 25, 26, 29, 30, 31, 35, and part of precinct 20. Senate Bill #320, Section 128.305, provides in part as follows: "All references in this act to \* \* \* precincts within \* \* \* St. Louis County mean those \* \* \* precincts as they existed on the 1st day of July, 1960, \* \* \*."

On July 1, 1960, Florissant Township contained 30 precincts. During the period between August 1 and November 1, 1960, seven additional precincts were created in Florissant Township by splitting five of the existing precincts. For the purposes of this opinion, it is only necessary to note that precinct 9 was divided into three new precincts numbered 9, 31, and 32; and precinct 19 was divided into two new precincts numbered 19 and 35. Thus, inasmuch as Senate Bill #320 attempts to include precincts 31 and 35 in the first congressional district, and inasmuch as precincts 31 and 35 were not in existence on July 1, 1960, ambiguity is apparent as to the description of the first congressional district.

An examination of the legislative history of Senate Bill #320 reflects that the bill, as perfected in the Senate, provided that references to precincts were to precincts as they existed on the 9th day of March, 1965. However, the House Committee substitute changed



Honorable Frank M. Karsten

the date to the 1st day of July, 1960, and the bill was finally passed with this provision. Therefore, in construing the provisions of the bill, this office must consider precincts as they existed on July 1, 1960.

As noted above, precincts 31 and 35 were not in existence on July 1, 1960. The remainder of the precincts assigned to the first district by Senate Bill #320, Section 128.212, were in existence on July 1, 1960, and therefore, these precincts in Florissant Township, St. Louis County, as precincts existed on July 1, 1960, are included in the first congressional district, as follows: 1, 2, 3, 4, 5, 19, 22, 23, 24, 25, 26, 29, 30, and part of 20. It has been noted above that precinct 35 was created from precinct 19 in the fall of 1960. Therefore, precinct 35, being included within precinct 19 on July 1, 1960, is a part of the first congressional district by reason of precinct 19 being included within said district. However, precinct 31 was a part of precinct 9 on July 1, 1960. Inasmuch as precinct 9 was assigned to the ninth congressional district by Senate Bill #320, precinct 31, as a part of precinct 9, is in the ninth congressional district.

You have also inquired in regard to an apparent ambiguity concerning a part of precinct 20. Senate Bill #320, Section 128.212, provides that all of the precinct 20 except that part which is bounded on the south by Redman Road, on the west and north by Bellefontaine Road, and on the east by the track of the C.B. and Q. Railroad, is in the first congressional district. Senate Bill #320, Section 128.292, provides in part that the ninth congressional district is composed of " \* \* \* all of Florissant Township, St. Louis County, except the following precincts: \* \* \* and all of precinct 20 except that part which is bounded on the south by Redman Road, on the west and north by Bellefontaine Road, and on the east by the track of the C.B. and Q. Railroad." Thus, the language of the statute appears to contain an exception to the exception with reference to precinct 20, and a construction of the statute is possible which would exclude the excepted area as described from inclusion in any congressional district. It is obvious that the Legislature did not intend to exclude this area from inclusion within a congressional district.

Senate Bill #320, Section 128.212, clearly assigns all of precinct 20, Florissant Township, St. Louis County, except that part which is bounded on the south by Redman Road, on the west and north by Bellefontaine Road, and on the east by the track of the C.B. and Q. Railroad, to the first congressional district. Senate Bill #320, Section 128.292, clearly assigns all of Florissant Township, St. Louis County, to the ninth congressional district except those precincts and parts of precincts which have been assigned to the first congressional district. Therefore, that part of precinct 20 excepted from the first congressional district is assigned to the ninth congressional district.

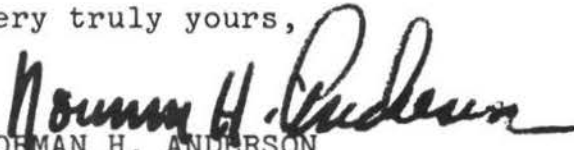
Honorable Frank M. Karsten

CONCLUSION

The first congressional district includes the following precincts in Florissant Township, St. Louis County, as the precincts existed on the 1st day of July, 1960: 1, 2, 3, 4, 5, 19, 22, 23, 24, 25, 26, 29, 30, and all of the precinct 20 except that part which is bounded on the south by Redman Road, on the west and north by Bellefontaine Road, and on the east by the track of the C.B. and Q. Railroad. The ninth congressional district includes all of the remaining precincts of Florissant Township, St. Louis County, as said precincts existed on July 1, 1960, including that part of the precinct 20 which is bounded on the south by Redman Road, on the west and north by Bellefontaine Road, and on the east by the track of the C.B. and Q. Railroad.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Thomas J. Downey.

Very truly yours,

  
NORMAN H. ANDERSON  
Attorney General

FILED

207

February 27, 1964

RE-ISSUED MARCH 1, 1966

OPINION NO. 207  
(Ans by Letter)

Mr. Howard J. Turnbull  
Supervisor  
Drivers License Registration  
Department of Revenue  
Jefferson City, Missouri

Dear Mr. Turnbull:

On December 18, 1962, I wrote to you with reference to a license revocation you had issued, wherein the licensee had pleaded guilty to the charge of leaving the scene of the accident, but the court had suspended the imposition of the sentence. With reference to that particular case, I told you that under the point system, points were only to be assessed against a "final conviction" and that such a conviction carries with it a concept of a sentence being imposed. Points were not to be imposed when the imposition of sentence is stayed.

Yesterday you asked me about those situations where a sentence has been imposed but the execution of the sentence has been suspended. For example, you claim that you receive quite a few conviction notices wherein it states that the licensee pleaded guilty or was convicted of an offense, that he was fined, but the judge stayed the execution of the fine.

In line with my letter of December 18th, it is my belief that once sentence has been imposed, the licensee has received a final conviction. You should assess the appropriate number of points under Chapter 302. This is true even though the judge suspends the execution of the penalty.

Yours very truly,

/s/ Eugene G. Bushmann

Eugene G. Bushmann  
Assistant Attorney General

March 1, 1966

Honorable G. Andy Runge  
Chairman, Missouri House of  
Representatives  
Districting Commission  
Jefferson City, Missouri



Dear Mr. Runge:

You have requested our views on two questions confronting the Missouri House of Representatives Districting Commission. The first question is -- When does the thirty day time limit on the action of the Commission commence? Article III, Section 3 of the Constitution of Missouri, as amended contains the following language, Page 4 Line 15 (House Joint Resolution No. 1, Conference Committee Substitute for House Substitute No. 4 for House Committee Substitute for House Joint Resolution No. 1, 73rd General Assembly, First Extra Session): "The Commission shall file its tentative plan and map within thirty days after its appointment \* \* \*". We believe that this means the date of the appointment of the Commission by the Governor. Our information is that the Governor appointed the Commission on February 21, 1966. We therefore conclude that the thirty day time provided for by this provision of the Constitutional Amendment commenced on February 21, 1966.

You have next inquired respecting our views on the above mentioned Constitutional Amendment relating to public hearings. Article III, Section 2 of the Constitution as amended, above referred to, Page 3 Line 47 referring to the organization of the Commission provides that the Commissioners shall "meet in the capitol building and proceed to organize by electing from their number a chairman, vice chairman and

Honorable G. Andy Runge

secretary and shall adopt an agenda establishing at least three hearing dates on which hearings open to the public shall be held. A copy of the agenda shall be filed with the clerk of the house of representatives within twenty-four hours after its adoption. \* \* \* We believe that the purpose of this provision respecting hearings was that the Commissioners should set public hearings during its early stages of consideration of its districting problem or at any rate the hearings should be during the period before it files its tentative plan and map with the Secretary of State. This is indicated by the fact that in the paragraph commencing on Page 3, Line 62 of Section 2, there is the further provision that after the Commission has filed its tentative plan of apportionment and map, it " \* \* \* shall hold such public hearings as may be necessary to hear objections or testimony of interested persons." Section 3 page 5 Line 25 provides: "Excepting only the time limits prescribed in this section, all provisions of Section 2 shall apply." It would therefore appear that the provisions of Section 2 respecting public hearings during the period of deliberations of the Commission is applicable.

After the initial plan and map have been filed as applied to the first redistricting Commission, Section (Page 5 Line 15) provides: " \* \* \* public hearings shall be held during the ensuing seven days \* \* \*". We therefore conclude that public hearings should again be held after the tentative plan and map is filed with the Secretary of State to permit opportunity for the public to make objections to the Commission or point out errors or corrections.

I hope this responds to your inquiry.

Yours very truly,

NORMAN H. ANDERSON  
Attorney General

By  
J. Gordon Siddens  
Assistant Attorney General

OPINION NO. 209  
Answered by Letter  
(WILSON)

August 15, 1966



Honorable Elva D. Mann  
Representative, Polk County  
Missouri House of Representatives  
Aldrich, Missouri

Dear Mr. Mann:

This is in response to your request for an opinion from this office regarding the University of Missouri retirement plan. The question which you raise is whether the General Assembly can, under Article III, Sections 38a and 39, appropriate money to the curators of the University of Missouri, a portion of which funds is used to provide funds for the University retirement system. You inform us that this system is not contributed to by employees of the University.

It is the opinion of this office that such an appropriation is valid under the Constitution of Missouri.

The following are the pertinent constitutional and statutory provisions:

Article III, Section 38a.

"The General Assembly shall have no power to grant public money or property, or lend or authorize the lending of public credit to any private person, association or corporation, excepting aid in public calamity, and general laws providing for pensions for the blind, for old-age assistance, for aid to dependent or crippled children or the blind, for direct relief, for adjusted compensation, bonus or rehabilitation for discharged members of the armed services of the United States who were bonified residents of this state during their service and for rehabilitation of other persons. . . "



Honorable Elva D. Mann

Article III, Section 39.

"The General Assembly shall not have power;

(1) to give or lend or to authorize the giving or lending of the credit of the state in aid or to any person, association, municipal or other corporation;

(2) To pledge the credit of the state for the payment of the liabilities present or prospective, of any individual, association, municipal or other corporation; . . . "

Article VI, Section 25.

"--No county, city or other political corporation or subdivision of the state shall be authorized to lend its credit or grant public money or property to any private individual, association or corporation, except that the general assembly may authorize any municipality to provide for the pensioning of the salaried members of its organized police force or fire department and the widows and minor children of the deceased members, and may authorize any city of more than 40,000 inhabitants to provide for the pensioning of other employees, and the widows and minor children of deceased employees, and may also authorize payments from any public funds into a fund or funds for paying benefits upon retirement, disability or death to persons employed and paid out of any public fund for educational services, and to their beneficiaries or estates."

Section 172.300, RSMo 1959:

"The curators may appoint and remove, at discretion, the president, deans, professors, instructors and other employees of the university; define and assign their powers and duties, and fix their compensation, and such compensation may include payments under, or provision for, such retirement, disability, or death plan or plans as the curators deem proper for persons employed by the university and paid out of any of its public funds for educational services, their beneficiaries or estates, and the curators may administer such plan or plans under such rules and regulations as they deem proper; and for these purposes the curators may use state-appropriated or other public funds under their control and pay or transfer such funds into a fund or funds for paying such benefits, and they may enter into agreements for and make contributions to both voluntary and statutory plans for paying such benefits."

Honorable Elva D. Mann

The constitutional authority of the Board of Curators to set up and provide for a University retirement system is found in Article VI, Section 25, quoted above, and more specifically, that portion of Section 25 providing that the General Assembly may authorize payments from any public funds into a fund or funds for paying benefits upon retirement to persons employed and paid out of any public fund for educational services. We note that there is nothing in this section which would indicate that the General Assembly must require matching payments by the specified employees.

Article VI, Section 25, was taken from Article IV, Section 47a, Missouri Constitution, 1875, providing:

"Nothing in this Constitution contained shall be construed as prohibiting payments, from any public funds, into a fund or funds, for paying benefits, upon retirement, disability, or death, to persons employed and paid out of any public fund, for educational services, the beneficiaries, or their estates."

This provision was adopted as an amendment to the Constitution of 1875, on November 3, 1936.

Section 172.300, quoted above, specifically allows the curators to provide for retirement "as the curators deem proper for persons employed by the university and paid out of its public funds. . . ." Thus, it appears that the General Assembly, in recognition of the fact that, under Article VI, Section 25, it "may authorize" the payment for public funds for the purpose of paying retirement benefits, has passed Section 172.300, specifically providing that the curators may make such retirement payments.

In Conclusion, it is the opinion of this office that the General Assembly may, under Article VI, Section 25, of the Missouri Constitution, appropriate money to the Board of Curators of the University of Missouri, a portion of which may be used, at the discretion of the Board, for providing retirement benefits for University employees.

Very truly yours,

NORMAN H. ANDERSON  
Attorney General

DRW/jlf

MOTOR VEHICLES:

TRUCKS:

TRAFFIC REGULATIONS:

WEIGHT REGULATIONS:

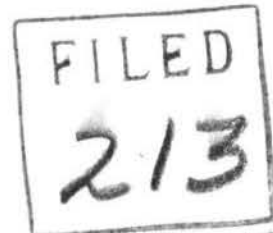
Pursuant to Section 304.230, RSMo. Cum. Supp. 1965, on roads other than the federal interstate system of highways, a truck operator is permitted to shift the weight on an overloaded axle or axle group in such a way as not to overload any axle or axles without being charged with a violation, even

though this be accomplished without removing or redistributing any part of the cargo on the truck; provided that an operator is guilty of a violation who thereafter intentionally shifts the weight in any manner so as to overload any axle or axles.

OPINION NO. 213

April 27, 1966

Honorable Alden S. Lance  
Prosecuting Attorney of Andrew County  
415 West Main Street  
Savannah, Missouri 64485



Dear Mr. Lance:

This is in response to your request for an official opinion of this office regarding Section 304.230, RSMo. Cum. Supp. 1965.

You state that when one or more axles of a truck have been found to be overloaded, the operators have been shifting this overload to other axles without removing any of the freight from the truck by the following procedures:

1. By moving the position of the fifth wheel which couples the trailer to the tractor on semi-trailer combination rigs.
2. Placing part of the load on an extension of the cargo-carrying part of the rig built over the cab portion of the truck.

You inquire whether such procedures comply with the law and avoid violations as provided in Section 304.230, supra.

Said Section 304.230, RSMo. Cum. Supp. 1965, states:

"1. It shall be the duty of the sheriff of each county or city to see that the provisions of sections 304.170 to 304.230 are enforced and any peace officer or police officer of any county or city or any highway patrol officer shall have the power to arrest on sight or upon a warrant any person found violating or having violated the provisions of said sections.

"2. The sheriff or any peace officer or any highway patrol officer is hereby given the power to stop any such conveyance or vehicle as above described upon the public highway for the purpose of determining whether such vehicle is loaded in excess of the provisions of sections 304.170 to 304.230 and if he finds such vehicle loaded in violation of the provisions hereof he shall have a right at that time and place to cause the excess load to be removed from such vehicle; and provided further, that any regularly employed maintenance man of the state highway department shall have the right and authority in any part of this state to stop any such conveyance or vehicle upon the public highway for the purpose of determining whether such vehicle is loaded in excess of the provisions of sections 304.170 to 304.230, and if he finds such vehicle loaded in violation of the provisions thereof he shall have the right at that time and place to cause the excess load to be removed from such vehicle. When only an axle or a tandem axle group of a vehicle is overloaded the operator shall be permitted to shift the load, if this will not overload some other axle or axles, without being charged with a violation; provided, however, the privilege of shifting the weight without being charged with a violation shall not extend to or include vehicles while traveling on the federal interstate system of highways. When only an axle or tandem axle group of the vehicle traveling on the federal interstate system of highways is overloaded and a court authorized to enforce the provisions of sections 304.170 through 304.230 finds that the overloading was due to the inadvertent shifting of the load changing axle weights in transit through no fault of the operator of the vehicle and that the load thereafter had been shifted so that no axle had been overloaded, then the court may find that no violation has been committed. The operator of any vehicle shall be permitted to back up and re-weigh, or to turn around and weigh from the opposite direction. Any operator whose vehicle is weighed and found to be within five per cent of any legal limit may request and receive a weight ticket, memorandum or statement showing the weight or weights on each axle or any

combination of axles. Once a vehicle is found to be within the limits of section 304.180 after having been weighed on any state scale and there is no evidence that any cargo or fuel has been added, no violation shall occur but a presumption shall exist that cargo or fuel has been added if upon re-weighing on another state scale the total gross weight exceeds the applicable limits of Section 304.180 or 304.190. The highway commission of this state may deputize and appoint any number of their regularly employed maintenance men to enforce the provisions of said sections, and the maintenance men herein delegated and appointed shall report to the proper officers any violations of sections 304.170 to 304.230 for prosecution by said proper officers.

"3. Any part of this section which shall be construed to be in conflict with the axle or tandem axle load limits permitted by the Federal-Aid Highway Act, section 127 of title 23 of the United States Code (public law 85-767 85th Congress) shall be null, void and of no effect." (Emphasis supplied)

By Section 304.240, RSMo., violations of the load law are declared to be misdemeanors.

Pursuant to the quoted statute, except on the Federal Interstate system of highways, when "only an axle or a tandem axle group of a vehicle is overloaded the operator shall be permitted to shift the load, if this will not overload some other axle or axles without being charged with a violation." The clause in the statute next following the part last quoted uses the term "shifting the weight" synonymously with shifting the load.

The word "load" is defined as "that which is, or is to be, laid on or put in anything for conveyance . . . a cargo; lading; pack." Webster's Second International Dictionary, P 1447. The same work defines the word "load" as meaning in mechanical terminology the "amount of pressure due to superimposed weight, whether stationary or moving;" id.

The question involved in your inquiry is whether, under the above quoted statute, shifting the load applies to the weight or pressure produced by the cargo or to the cargo itself. The fact that the statute equates "load" with "weight" is some indication that emphasis is upon the force applied to an axle as distinguished from the heavy objects producing such force.



In Section 304.180, RSMo. Cum. Supp. 1965, referred to in Section 304.230, supra, subsection 2 reads:

"2. An 'axle load' is defined as the total load transmitted to the road by all wheels whose centers are included between two parallel transverse vertical planes forty inches apart, extending across the full width of the vehicle."

It is clear from the quoted definition that the legislature had in mind the force acting on the axle as distinguished from the objects exerting such force. "Total load transmitted to the road" does not mean freight or cargo transmitted to the road, but means weight or force transmitted to the road.

Thus in permitting truck operators to shift the load, the legislature by enacting Section 340.230, supra, intended to permit such operators to redistribute the weight or force exerted on an axle or axle group, without reference to any actual removal or redistribution of cargo.

Since this interpretation is a reasonable one, we adopt it in view of the rule of statutory construction that criminal statutes should be strictly construed against the state and liberally in favor of the defendant. *State v. Getty, Mo.*, 273 SW2d 170.

Please note, however, that once an operator has been permitted to so shift the weight on the axles, the vehicle may not again be altered so as to create an overloading on any axle. Otherwise the purpose of the overload law would be thwarted in many instances and the preposterous result would be that overloading would occur on the road where the damage is done, but not at the weight station where no harm ensues. Statutes should not be so construed as to take the life out of the law, *Murphy v. Wabash Railroad Co., Mo.*, 128 SW 481, but with a view to effectuate the legislative purpose, *In re Gartside's Estate, Mo.*, 207 SW2d 273, promoting the meaning of the statute and not giving it any absurd construction, *Rector v. Tobin Construction Co., Mo. App.*, 351 SW2d 816.

#### CONCLUSION


It is the opinion of the Attorney General that pursuant to Section 304.230, RSMo. Cum. Supp. 1965, on roads other than the federal interstate system of highways, a truck operator is permitted to shift the weight on an overloaded axle or axle group in such a way as not to overload any axle or axles without being charged with a violation, even though this be accomplished without removing or redistributing any part of the cargo on the truck; provided that an operator is guilty of a violation who thereafter intentionally shifts the weight in any manner so as to overload any axle or axles.



Honorable Alden S. Lance

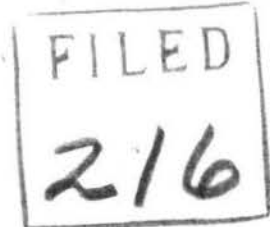
The foregoing opinion, which I hereby approve, was prepared by my assistant, Donald L. Randolph.

Very truly yours,



NORMAN H. ANDERSON  
Attorney General

May 3, 1966



Honorable Charles H. Baker  
Prosecuting Attorney  
Dunklin County  
Kennett, Missouri

Dear Mr. Baker:

This letter is in response to your request for an official opinion. You inquire as to the effect of a tie vote on the reemployment of a public schoolteacher.

Section 168.111, RSMo. Supp. 1965, sets forth the law concerning the reemployment of public schoolteachers. Subsection 4, of this statute provides:

"Any motion regarding lack of reemployment of a teacher shall include only one person and a tie vote thereon constitutes reemployment. Disapproval of reemployment to be effective requires a majority vote of the whole board."(Emphasis added)

Since this statute expressly provides that a tie vote on the question of reemployment is sufficient to approve reemployment, there can be no doubt that if a board votes upon reemployment and the vote is tied, then the teacher is entitled to reemployment. The further provisions of Subsection 4, which require a majority vote to disapprove reemployment, also manifest the legislative intent that a tie vote is sufficient to approve reemployment.

Consistent with this provision of Section 168.111, Section 162.301(3), RSMo. Supp. 1965, states:

"A majority of the board constitutes a quorum for the transaction of business, but no contract shall be let, teacher employed, bill approved or warrant ordered

Honorable Charles H. Baker

unless a majority of the whole board votes therefor. When there is an equal division of the whole board upon any question except the reemployment of a teacher, the county superintendent of schools, if requested by at least three members of the board, shall cast the deciding vote upon the question, and for the determination of the question shall be considered a member of the board."

Under the former statutes the courts held that where a vote by a school board on a motion to reemploy a teacher resulted in a tie vote the teacher was not entitled to a contract of reemployment. See, for example, State ex rel. Joslin v. School District No. 7 of Jasper County, Mo. App. 302 S.W.2d 497. These decisions were made under the prior statute, Section 163.090, RSMo 1959. This statute, however, was amended (Laws 1961, p. 351) as quoted above, thus the previous court decisions no longer reflect the law of this State.

Therefore, under the present law where a school board votes on a motion to reemploy a teacher, if a tie vote results, the teacher is entitled to a contract for reemployment.

Yours very truly,

NORMAN H. ANDERSON  
Attorney General

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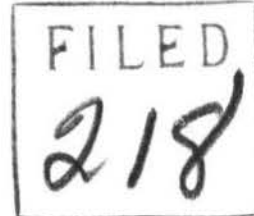
INITIATIVE:  
COUNTY COUNCIL:  
ST. LOUIS COUNTY CHARTER:

For the purpose of determining the sufficiency of initiative petitions under the St. Louis County Charter the petitions must be signed by at least 5 percent of the total vote cast for governor at the last election in at least 5 of the Council districts from which presently serving councilmen were elected.

May 23, 1966

OPINION NO. 218

Honorable Norman Barken, Counselor  
Board of Election Commissioners  
8005 Forsyth Boulevard  
Clayton, Missouri 63105



Dear Mr. Barken:

Your letter of March 4, 1966, requesting an opinion from this office is as follows:

"St. Louis County Council did on or about September 10, 1964, adopt an ordinance establishing new districts for the election of councilmen in said County. A copy of said ordinance is attached hereto and made a part hereof. Subsequent to the adoption of said ordinance, a group of citizens have been circulating petitions pursuant to the initiative powers of Article VII, Sec. 78 of the Charter of St. Louis County, 1950, as amended. Said Section states:

"Section 78. Initiative petitions proposing ordinances shall be signed by qualified voters equal in number to at least 5 percent of the total vote cast for governor in at least five of the Council districts at the last election at which a governor was chosen. Each petition shall contain the full text of the measure and an enacting clause which shall read as follows: 'Be it enacted by the people of St. Louis County:'. Such petitions shall be filed with the Board of Election Commissioners which shall be the judge of their sufficiency. The Board shall submit the proposed ordinance to the voters at the next general election held at least 60 days after the petitions are filed. An affirmative vote of a majority of those voting on the proposition shall be sufficient for its adoption."

Honorable Norman Barken

"Pursuant to said Section, the petitions must contain sufficient signatures from at least five of the Council districts.

"The Board of Election Commissioners has been asked to respond to the query that if said initiative petitions are filed with the Board whether or not said petitions must contain the prescribed number of petitioners from the "old" Council districts or from the new Council districts, pursuant to the ordinance attached hereto. We desire to obtain your opinion as to the validity of initiative petitions under Section 78 as to whether or not said petitions are to be from the old or new Council districts, if said petitions are filed with the Board of Election Commissioners subsequent to February 1, 1966 and prior to August 1, 1966."

Article VII, Section 78, of the Charter of St. Louis County, 1950, as amended provides:

"Section 78. Initiative petitions proposing ordinances shall be signed by qualified voters equal in number to at least 5 percent of the total vote cast for governor in at least five of the Council districts at the last election at which a governor was chosen \* \* \*".

Your question is whether or not the petitions must contain 5 percent of the qualified voters of the total vote cast at the last gubernatorial election in at least five councilmanic districts, as they existed prior to adoption of the ordinance changing the districts.

The ordinance establishing the new voting districts provides that the voters of the odd-numbered districts shall elect a councilman in 1966, and even numbered in 1968. This advance Section 103.260, is as follows:

"The qualified voters of each of the odd-numbered districts shall nominate and elect a member of the Council at the primary and general elections held in 1966. The qualified voters of each of the even-numbered districts shall nominate and elect a member of the Council at the primary and general elections held in 1968. Each member of the Council shall take office on the first day of January following his election and shall serve for a term of four (4) years."

In our opinion the new districts do not come into existence insofar as Section 78 of Article VIII of the Charter is concerned until such time as the councilmen are elected for those districts.

Honorable Norman Barken

This office issued Opinion No. 164 on April 13, 1962, to Warren E. Hearnnes, then Secretary of State of Missouri, wherein a similar question was decided. The congressional districts of Missouri were reduced from eleven to ten, due to the drop in population under the 1960 census. The question at that time was raised in regard to initiative petitions which required 8 percent of the voters voting in the last gubernatorial election in each of two-thirds of the districts in the state. The Hearnnes opinion, a copy of which is attached, holds that the new districts had no existence insofar as initiative petitions are concerned until such time as a representative was elected.

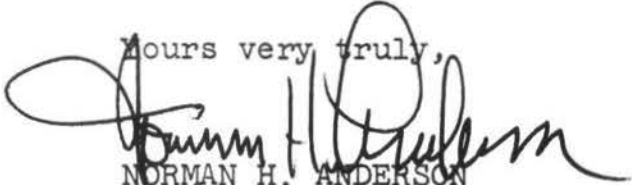
In our opinion therefore, the councilmanic districts to be considered for the purpose of determining the sufficiency of initiative petitions are those districts from which existing councilmen were previously elected .

#### CONCLUSION

It is our opinion that for the purpose of determining the sufficiency of initiative petitions submitted under "Article VII, Section 78, of the Charter of St. Louis County, 1950," the petitions must be signed by at least 5 percent of the total vote cast for governor in the last election in at least five of the Council districts from which presently serving councilmen were elected.

The foregoing opinion which I hereby approve was prepared by my assistant, O. Hampton Stevens.

Yours very truly,



NORMAN H. ANDERSON  
Attorney General

Encl: Opinion No. 164, dated April 13, 1962, to Warren E. Hearnnes, Secretary of State of Missouri.



COUNTIES:                   The County Court of Washington County must comply  
COUNTY COURTS:           with the method of letting contracts for the con-  
PUBLIC ROADS:             struction of roads, as provided in Section 229.050,  
                              RSMo 1959, when the estimated cost thereof exceeds  
                              the sum of \$500.

Opinion No. 224

June 7, 1966

Honorable Robert L. Carr  
Prosecuting Attorney  
Washington County  
Potosi, Missouri



Dear Mr. Carr:

This is in response to your request for an opinion which reads in part as follows:

"The County Court of Washington County, Missouri, has directed me to request the views of your office in the matter of purchases of asphalt to be applied by the supplier to public roads of Washington County.

"The Missouri State Highway Department has indicated to the County Court of Washington County that the department considers it to be its responsibility to determine that purchases of asphalt to be applied by the supplier be made under the requirements of Section 229.050, RSMo 1959. At present, the Washington County Court purchases asphalt, applied, at rates per gallon, as set out in the enclosed contract for the current year. Section 229.050, RSMo 1959, and the bidding therein provided, has not been followed by the County."

In addition, you have informed this office that the cost of the asphalt purchases under the subject contract is in excess of \$500.

Thus, the question presented is whether purchases of asphalt for the public roads of Washington County are to be made under the provisions of Section 229.050, RSMo 1959, providing for the letting of contracts after advertising and bidding, and providing that the contract shall be awarded to the lowest possible bidder.

It is the opinion of this office that your question must be answered affirmatively.

Honorable Robert L. Carr

Section 229.050, RSMo 1959, states:

"1. Whenever it shall be ordered by the county court, township board or district commissioner, as the case may be, that any road, bridge or culvert in the county be constructed, reconstructed or improved or repaired by contract, and the engineer's estimated cost thereof exceeds the sum of five hundred dollars, the county, township or district authorities shall order the county highway engineer, or other engineer in their employ, or both such engineers acting together, if so desired, to prepare and file with the clerk of the court, township board or district commissioners, as the case may be, all necessary maps, plans, specifications and profiles, and an estimate of the cost of the work. The court or other proper authority may approve or reject the maps, plans, specifications and profiles and order others prepared and filed.

"2. When the maps, plans, specifications and profiles have been approved, the county, township or district authorities shall order the engineer to advertise the letting of the contract proposed to be let by advertisement in some newspaper published in the county wherein the contract is to be executed, which said advertisement shall be published once a week for three consecutive weeks, the last insertion to be within ten days of the day of letting.

"3. All bids shall be in writing, accompanied by instructions to bidders which shall be furnished by the engineer upon application. All bids on road work shall state the unit prices upon which the same are based. All bids shall be sealed and filed with the clerk of the county court, township board or special road district commissioners, and on the day and at the hour named in the advertisement, shall be publicly opened and read in the presence of the court, township board or special road district commissioners, and the engineer, and shall then be recorded in detail in some suitable book . . .

"4. The contract shall be awarded to the lowest responsible bidder. The court may in its discretion reject any or all bids. Any bid in excess of the engineer's estimate of the cost of the work to be done shall be rejected. When it shall be decided by order of record to accept any bid, the county, township or district authorities shall order a contract to be entered into by and between the bidder and the county, township or special road district, as the case may be. The

Honorable Robert L. Carr

contract shall have attached to and made a part thereof the proposal sheet, instructions to bidders, the bid, maps, plans, specifications and profiles."

In Hillside Securities Co. v. Minter, et al, 254 SW 188, 300 Mo 380, the Supreme Court, en banc, considered the question which you propound. The Court stated:

"Section 10734 [now Section 229.050, RSMo 1959] provides an exclusive method of letting contracts for the construction of bridges by the county court. It requires that all work let by contract, of an estimated cost of over \$500.00, shall be let, after due advertisement, upon bids made upon maps, plans, specifications, and profiles, previously prepared by the highway engineer. That the statute does not contemplate the letting of contracts upon plans other than those submitted by the highway engineer and approved in advance of advertising and acceptance of bids of contractors bidding upon such plans is clear . . . " 254 SW 190.

The Court, in the Hillside Securities case, affirmed the general principle upon which its holding was based, quoting from an earlier decision, Wolcott v. Lawrence County, 26 Mo 272. The Court there stated:

"The county court is only the agent of the county, and, like any other agent, must pursue its authority and act within the scope of its power. In respect to many things that concern the county, it has a large discretion; but in reference to the erection of county buildings its authority is defined by a public law, and is special and limited. It cannot act like general agents, whose acts may bind their principles if performed within the general scope of their agency, though in violation of private instructions unknown to those who deal with them; for it has no power over the subject except such as is given by law; and every person who deals with the county court, acting in behalf of the county, is bound to know the law that confers the authority. . ."

Further, the court held that since contracts not entered into in compliance with this statute are void, recovery will be allowed neither under the contract, nor under the theory of quantum meruit. Hillside Securities Co. v. Minter, supra, at page 193.

Honorable Robert L. Carr

The Hillside Securities case was followed in the later case of Hanick v. Marion County, 278 SW 730, 312 Mo 81.


These cases appear to represent the law in this state on the point raised in your request. Thus, under these authorities, the contract between the County Court of Washington County and the supplier of asphalt, since it was entered into without compliance with the bidding requirements of Section 229.050, RSMo 1959, is void.

CONCLUSION

It is the conclusion of this office that the County Court of Washington County must comply with the method of letting contracts for the construction of roads, as provided in Section 229.050, RSMo 1959, when the estimated cost thereof exceeds the sum of \$500.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Donald R. Wilson.

Very truly yours,



NORMAN H. ANDERSON  
Attorney General

SCHOOLS: A school annexation election under Section 162.441  
ANNEXATION: RSMo Supp. 1965, may be held within less than two  
ELECTIONS: years of a prior annexation election where the subsequent election involves a different proposal.

OPINION NO. 228

December 9, 1966

Honorable Alden S. Lance  
Prosecuting Attorney  
415 West Main Street  
Savannah, Missouri



Dear Mr. Lance:

This official opinion is rendered in response to a request for a ruling. Your letter contains four separate questions for our consideration.

It is our understanding that your first question has been answered by our previous telephone conversations, therefore it shall not be considered herein. Your third and fourth questions involve separate subjects and we believe them to require treatment in opinions dealing solely with each question. Thus, we shall consider your third and fourth question as separate opinion requests and issue a separate ruling upon each. This opinion will rule solely upon your second question.

Your second question requests an interpretation of Section 162.441(5), RSMo Supp. 1965, under the following factual situation: A valid petition for annexation of school districts was received. A special election was held and the annexation defeated. Subsequently, another petition was received proposing annexation to a district different from that proposed in the earlier petition.

Your question is: May a special election be called on the second annexation proposal within less than two years after the election on the first proposal?

The procedure for annexation of school districts was formerly set forth by Section 165.300, RSMo. This section contained the following proviso:

" . . . that after the holding of any such election, no other such special election shall be called within a period of two years thereafter. . . ."

Honorable Alden S. Lance

This provision was construed by this office to mean that after a district had submitted an annexation at a special election that a subsequent annexation proposal, even though it involved annexation to a different district than the first, could not be submitted at a special election until two years after the date of the first election. Opinion No. 24, Downs, 8-2-54. For reasons stated hereafter, Opinion No. 24 is hereby withdrawn.

The ruling of this office in Opinion No. 24, supra, was supported by decision of the Missouri Supreme Court in State ex inf Rice v. Hawk, Mo., 228 S.W.2d 785. The appellants in that case contended that the two-year waiting period did not apply where the second annexation proposal involved annexation to a different district than that submitted in the first proposal. The Court rejected this contention and held that when a special election had been held under the statute, no other special election, even though involving a different proposal, could be held within a period of two years thereafter.

The annexation statute was amended by the new school code. Laws 1963, p. 227. Subsection 5, of the presently effective annexation statute, Section 162.441, RSMo Supp. 1965, provides as follows:

"If a majority of the votes cast are against annexation, no other election on the proposal shall be called within two years after the election." [Emphasis added]

The words of the present statute are different from the prior statute. It is presumed that the legislature in changing the words had the intention to change the law. The legislature is also presumed to have had knowledge of judicial constructions of the prior statute. The conspicuous change by the legislature is the addition of the words "on the proposal" after the word "election" in the statute. We also note that the legislature used the definite article "the" and not the indefinite article "a".

The addition of the phrase "on the proposal" after the word "election" manifests legislative intent that the two-year waiting period should not apply after every annexation election, but only to subsequent elections on the same annexation proposal. Accordingly, a subsequent annexation election on a different proposal would not be restricted by the two-year waiting period. Legislative notice of the facts and rulings of the Hawk case, supra, fortify this interpretation.



Honorable Alden S. Lance

CONCLUSION

Therefore, it is the opinion of this office that a school annexation election under Section 162.441 RSMo Supp. 1965, may be held within less than two years of a prior annexation election where the subsequent election involves a different proposal.

The foregoing opinion, which I hereby approve was prepared by my assistant Louis C. DeFeo, Jr.

Yours very truly,

  
NORMAN H. ANDERSON  
Attorney General

COUNTIES:  
CITIES, TOWNS AND VILLAGES:  
COLLECTORS:  
COUNTY COLLECTOR:  
ST. LOUIS COUNTY:

St. Louis County, Missouri, has the power to contract with third and fourth class cities of that county to have the county collect city real and personal property taxes.

REVISED  
OPINION NO. 230

March 29, 1966

Honorable Haskell Holman  
State Auditor  
Capitol Building  
Jefferson City, Missouri



Dear Mr. Holman:

This is in answer to your request for an opinion on whether St. Louis County, Missouri, can enter into a contract with third and fourth class cities in that county to have the county collect the city's real and personal property taxes.

Section 70.220, RSMo. 1959, reads as follows:

"Any municipality or political subdivision of this state, as herein defined, may contract and cooperate with any other municipality or political subdivision, or with an elective or appointive official thereof, or with a duly authorized agency of the United States, or of this state, or with other states or their municipalities or political subdivisions, or with any private person, firm, association or corporation, for the planning, development, construction, acquisition or operation of any public improvement or facility, or for a common service; provided, that the subject and purposes of any such contract or cooperative action made and entered into by such municipality or political subdivision shall be within the scope of the powers of such municipality or political subdivision. If such contract or cooperative action shall be entered into between a municipality or political subdivision and an elective or appointive official of another municipality or political subdivision, said contract or cooperative action must be

Honorable Haskell Holman

approved by the governing body of the unit of government in which such elective or appointive official resides."

Thus, counties and cities may contract for a common service, in this instance collection of real and personal property taxes, provided the subject and purpose is within the scope of their powers.

Chapter 52, RSMo., provides for a county collector to collect county real and personal property taxes, and Chapter 94, RSMo., provides for a city collector to collect real and personal property taxes of third and fourth class cities.

Therefore, the subject and purpose of a contract providing for the collection of third and fourth class cities taxes by a county collector is within the scope of city and county powers.

Further, Section 77.370, RSMo. 1959, respecting third class cities shows that the legislature expressly authorized the collection of taxes as a common service that may be contracted for under Section 70.220, supra. Section 77.370 reads in part as follows:

"3. Whenever a city contracts for the assessment of property or the collection of taxes by the county or township assessor or collector respectively, as authorized by section 70.220, RSMo, the city council shall by ordinance provide that at the expiration of the term of the then city assessor or collector, as the case may be, the office is abolished and thereafter no election shall be had to fill the office; except that in the event the contract expires and, for any reason, is not renewed, the council may by ordinance provide for the election of such officer at the next and succeeding regular elections for municipal officers."

We also note that St. Louis County is a Charter County. Article VI, Section 18(c), Constitution of Missouri, provides that charter counties may perform services of municipalities and reads as follows:

"Provisions authorized in county charters-- participation by county in government of other local units.--The charter may provide

Honorable Haskell Holman

for the vesting and exercise of legislative power pertaining to public health, police and traffic, building construction, and planning and zoning, in the part of the county outside incorporated cities; and it may provide, or authorize its governing body to provide, the terms upon which the county shall perform any of the services and functions of any municipality, or political subdivision in the county, except school districts, when accepted by a vote of a majority of the qualified electors voting thereon in the municipality or subdivision, which acceptance may be revoked by like vote."

Subsections 18 and 19 of Section 22, Article III, Charter St. Louis County, Missouri, give the County Council certain powers as follows:

"(18) To cooperate or join by contract or otherwise with any city, county, state or political subdivision or agency thereof, or with the United States or any agency thereof, for the planning, development, construction, acquisition or operation of any public improvement or facility, or for a common service; and to accept, in the name of the County, gifts, devises, bequests, and grants-in-aid from any city, county, state or political subdivision or agency thereof, or from the United States or any agency thereof;

"(19) To provide the terms upon which the County shall perform any of the services and functions of any municipality or political subdivision in the County, except school districts, when accepted by a vote of a majority of the qualified electors voting thereon in such municipality or subdivision, which acceptance may be revoked by a like vote; and to cooperate and contract with the municipalities or political subdivisions in the County as otherwise authorized by this charter and by law;"

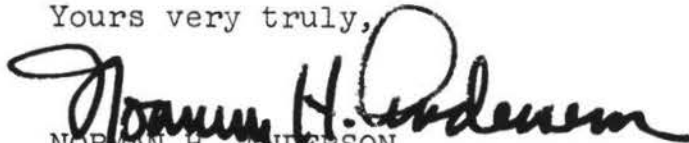
Honorable Haskell Holman

CONCLUSION

It is the opinion of this office that St. Louis County, Missouri, has the power to contract with third and fourth class cities of that county to have the county collect city real and personal property taxes.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Walter W. Nowotny, Jr.

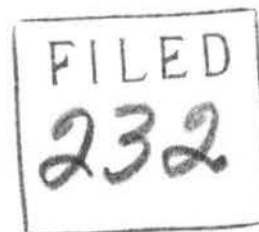
Yours very truly,

  
NORMAN H. ANDERSON  
Attorney General

LIQUOR: A suspension of imposition of sentence after a finding of guilty is not a conviction within the meaning of the Liquor Control Law, Chapter 311, RSMo, and the Nonintoxicating Beer Law, Chapter 312, RSMo.

OPINION NO. 232

August 11, 1966



Honorable Lawrence F. Gepford  
Prosecuting Attorney  
Jackson County  
Kansas City, Missouri

Dear Mr. Gepford:

This is in answer to your request for an opinion on whether the following constitutes a conviction within the meaning of the Missouri Liquor Control Law. You have stated that after a jury finding of guilty a federal district court made the following judgment and order:

"It Is Adjudged that the defendant is guilty as charged and convicted.

"It Is Adjudged that imposition of sentence of imprisonment or fine is suspended as to Count 8, and defendant is placed on probation for a period of five (5) years under the general conditions of probation adopted by the Court, which will be communicated to the defendant orally and in writing by the U. S. Probation Office. No costs assessed."

Section 311.060, RSMo 1959, of the Liquor Control Law and Section 312.040, RSMo 1959, of the Nonintoxicating Beer Law both provide that "conviction" of certain laws disqualifies that person for a liquor license.

The Kansas City Court of Appeals in Meyer v. Missouri Real Estate Commission, 238 Mo App 476, 183 SW 2d 342, met this question of what constitutes a conviction in relation to the Missouri Real Estate Law. There the Real Estate Law provided, i.c. SW2d 343, that anyone "convicted" of certain offenses would have his real estate license revoked. Plaintiff had been "convicted" of embezzlement and



Honorable Lawrence F. Gepford

filed a declaratory judgment action that this was not a conviction as meant by the Real Estate Law. Plaintiff had entered a plea of nolo contendere to the charges of embezzlement and the Federal District Court entered the following order, 1.c. SW2d 342:

"'For good cause shown, the Court doth Order that the imposition of sentence upon the defendant under each of counts two, three, four, five, six and seven and eight of the indictment be, and the same is hereby suspended and said defendant, Franklyn E. Meyer, placed on probation thereunder for a period of Three (3) Years in accordance with conditions of probation this day filed herein.'"

The court in holding that this was not a conviction within the meaning of the Real Estate Law said, 1.c. SW2d 345:

"\* \* \* We have been cited to no authority holding that the suspension of the imposition of the sentence, or the suspension of the sentence, itself, upon a plea or a verdict of guilty, and the placing of the defendant upon probation, is a final judgment within the meaning of the statutes giving effect to such proceedings in another proceeding.

It is held that where there has been a suspended sentence there is no final judgment. People v. Page, supra, 125 Misc. 538, 211 N.Y.S. 401, loc. cit. 405; 24 C.J.S., Criminal Law, Sections 1571, 1618, pp. 47, 187. If this is so it would seem that, certainly, where there has been no sentence at all but merely a suspension of the imposition of sentence, as in this case, there has been no such judgment.

"[2] We are of the opinion that the word 'conviction', as used in the Missouri Real Estate Commission Act, should be taken in its most comprehensive sense, that is, to include the judgment of the court upon a verdict or confession of guilt. \* \* \* "

Honorable Lawrence F. Gepford

And, 1.c. SW2d 346, 347:

"\* \* \* However, where the reference is to the ascertainment of guilt in another proceeding (as here), and the question as to its bearing upon the status or rights of the individual in a subsequent case is under consideration, a broader meaning is to be attached to the word 'conviction', and a person is not deemed to have been convicted unless it is shown that a judgment is pronounced upon a verdict or plea of guilty. The rule is well stated in *People v. Fabian*, supra, as follows: 'Where sentence is suspended, and so the direct consequences of fine and imprisonment are suspended or postponed temporarily or indefinitely, so, also, the indirect consequences are likewise postponed.'"

Thus, the Meyer case, supra, held that there is no conviction where imposition of sentence is suspended and the defendant is placed on probation.

The Supreme Court in *Wilson v. Burke*, 202 SW2d 876, restated the holding in Meyer, supra. In the Wilson case an applicant for a liquor license had been found guilty on a plea of nolo contendere of a federal liquor law and been fined two hundred and fifty dollars. The applicant contended this was not a conviction because of the nolo contendere plea. The court in holding there was a conviction distinguished the Meyer case and said this, 1.c. 878:

"In that case, however, there was no 'conviction'. Meyer entered a nolo contendere plea to the embezzlement charge and the Court's judgment therein recited that 'the imposition of sentence \* \* \* be, and the same is hereby suspended and said defendant \* \* \* placed on probation'. In that case Meyer was never (as was respondent here) 'found guilty' and there never was in Meyer's case a judgment of 'conviction'. The Meyer case is no authority for the contentions which respondent makes in the instant case."

Honorable Lawrence F. Gepford

It is our opinion that the Meyer case, supra, is controlling here. We have considered Neibling v. Terry, Mo, 177 S.W.2d 502; Berman v. United States, 302 U.S. 211, 82 L.Ed. 204, 58 S.Ct. 164; Korematsu v. United States, 319 U.S. 432, 87 L.Ed. 1497, 63 S.Ct. 1124; and Tanzer v. United States, 278 F.2d 137, cert. denied 364 U.S. 863, 5 L.Ed. 2d 85, 81 S.Ct. 103. Therefore, a suspension of imposition of sentence after a finding of guilty is not a conviction within the meaning of the Liquor Control Law, Chapter 311, RSMo, and the Nonintoxicating Beer Law, Chapter 312, RSMo.

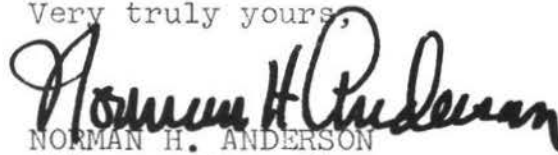
We have examined the case of Roberts v. United States, 320 U.S. 264, 268; Korematsu v. United States, 319 U.S. 432; Tanzer v. United States, 278 F.2d 137, certiorari denied, 364 U.S. 863. While the Federal Courts may subscribe to a different principle relative to whether the suspension of the imposition of sentence constitutes a conviction, we are convinced that the Missouri Courts have not adopted that view. We have not been asked and this opinion does not rule on the question of whether a person who has been found guilty of tax evasion is a person of good moral character within the meaning of Chapter 311 and Chapter 312 of the Missouri statutes.

#### CONCLUSION

It is the opinion of this office that a suspension of imposition of sentence after a finding of guilty is not a conviction within the meaning of the Liquor Control Law, Chapter 311, RSMo, and the Nonintoxicating Beer Law, Chapter 312, RSMo.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Walter W. Nowotny, Jr.

Very truly yours,

  
NORMAN H. ANDERSON  
Attorney General

PROSECUTING ATTORNEYS:  
COUNTIES:  
CHARTER COUNTIES:  
LEGISLATURE:

The legislature may validly pass a statute requiring the Prosecuting Attorney of a Constitutional Charter County to devote full time to his duties.

March 29, 1966

OPINION NO. 234

Honorable Maurice Schechter  
Senator, 13th District  
41 Country Fair Lane  
Creve Coeur, Missouri



Dear Senator Schechter:

Recently you requested an official opinion from this office as follows:

"I am enclosing a copy of the above bill which was referred to the Senate Committee on Criminal Jurisprudence, and a hearing on such bill was held last night.

During the course of the hearing, Senator Cliff Jones and I commented that we had doubts as whether the Missouri Legislature could, by law, regulate the duties of the Prosecuting Attorney of St. Louis County, and we stated that such jurisdiction is vested in the St. Louis County Council under the county charter.

The county charter provides that the Prosecuting Attorney shall have a 4-year term and the Council shall and does set his salary.

The above bill, as it applies to St. Louis County, makes the Prosecuting Attorney of both first class counties a full-time job.

The Senate Committee designated me to request an opinion from your office to determine if the Missouri Legislature has the authority to compel the Prosecuting Attorney of St. Louis County to devote full time to his office.

Honorable Maurice Schechter

"The Committee has indicated that it intends to hold such bill in abeyance until it receives your opinion."

You refer to Senate Bill No. 7, now pending before the 73rd General Assembly, Second Extra Session. Since St. Louis County is a charter county you inquire whether the General Assembly has authority to compel the Prosecuting Attorney of St. Louis County to devote full time to his office and not engage in private practice of law.

Article VI, Section 18(a), Constitution of Missouri 1945, provides that any county having more than 85,000 inhabitants may frame, adopt and amend a charter for its own government.

Article VI, Section 18(b), Constitution of Missouri 1945, provides:

"Provisions required in county charters.--The charter shall provide for its amendment, for the form of the county government, the number, kinds, manner of selection, terms of office and salaries of the county officers, and for the exercise of all powers and duties of counties and county officers prescribed by the Constitution and laws of the state."

Under the above constitutional provision the county charter is to provide for the number, kinds, manner of selection, terms of office and salaries of the county officers.

Article VI, Section 18(e) Constitution of Missouri 1945, provides:

"Laws affecting charter counties -- limitations.  
--Laws shall be enacted providing for free and open elections in such counties, and laws may be enacted providing the number and salaries of the judicial officers therein as provided by this Constitution and by law, but no law shall provide for any other office or employee of the county or fix the salary of any of its officers or employees."

Honorable Maurice Schechter

Under this constitutional provision the legislature has authority to enact laws providing for free and open elections in the counties, and laws may be enacted providing the number and salaries of the judicial officers therein as provided in this constitution and by law there follows a limitation "but no law shall provide for any other official or employee of the county or fix the salary of any of its officers or employees."

A prosecuting attorney is not a judicial officer as that term is used in the above constitutional provision. Article V, Constitution of Missouri 1945; State ex rel Heimburger v. Wells, 210 Missouri 601.

Article VI, Sections 18 (b) and 18(e) of the Constitution were considered by the Supreme Court in State ex rel Shepley v. Gamble, 280 SW 2d 656. The question before the Court in this case concerned the authority of St. Louis County to amend its charter so as to provide for a police department and to vest in the police department powers and duties with respect to the preservation of order, prevention of crimes, and misdemeanors, apprehend and arrest, conserve the peace, and other police and law enforcement functions other than those relating to civil actions and detention, care and custody of prisoners in the county jail which authority had previously been vested in the sheriff and county constables under the county charter. In discussing the authority of the county council to create the county offices and designate the duties and responsibilities of the officers the Court, among other things, stated, l.c. 659:

"[2] St. Louis County, regardless of its charter, remains a legal subdivision of the state. Art. VI, §§ 1 and 18 (a). As such, it is charged with the performance of the state functions just as other counties are. Section 18 (b), supra, expressly requires that the charter must provide 'for the exercise of all powers and duties of counties and county officers prescribed by the constitution and laws of the state.'

[3] A charter county differs from others chiefly in the form of county government which it may adopt. The charter must provide for the structure of county government and shall provide for 'the number, kinds, manner of selection, terms of office and salaries of the county officers.' Section 18(b), supra. In fact,



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the General Assembly is prohibited from providing for any office or employee of the county or fixing the salary of any of its officers or employees other than election and judicial offices and officers. Section 18(e), supra. This is an express limitation on the legislative power.

[4,5] Moreover, charter counties are endowed with some of the powers and functions of a municipal corporation in the area outside incorporated cities. They are empowered to exercise legislative power pertaining to public health, police and traffic, building construction, and planning and zoning in such areas. Section 18(c), supra. These are police powers ordinarily vested in municipal corporations. See, for example, Sections 73.010 and 73.110 RSMo 1949, V.A.M.S., relating to the organization and powers of cities of the first class. A county under the special charter provisions of our constitution is possessed to a limited extent of a dual nature and functions in a dual capacity. It must perform state functions over the entire county and may perform functions of a local or municipal nature at least in the unincorporated parts of the county. These are constitutional grants which are not subject to, but take precedence over, the legislative power. St. Louis County alone has the right to determine 'the number, kinds, manner of selection, terms of office and salaries' of its county officers. There can be no doubt that this is a proper constitutional provision, since the people of the state are sovereign, Art. I, §1, and they 'have the inherent, sole and exclusive right to regulate the internal government and police thereof \* \* \*.' Art. I, §3. The constitution is harmonious in recognizing an exception to the provision for general laws for the organization and classification of counties. Art. VI, §8."

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In *Stemmler v. Einstein*, 297 SW 2d 467, the question before the court was whether under the constitution, St. Louis City was authorized to form a county charter under Sections 18(a) to 18 (1) Article VI. In discussing the constitutional provisions in Sections 19(a) and 18(b), the court stated, l.c. 472:

"\* \* \*These sections make sweeping limitations upon the power of the General Assembly to enact laws relating to the government of a county so chartered. Such limitations can, of course, be made but the intent to do so must either expressly appear or its implication be clear, strong and convincing, if not, as has been said, absolutely necessary. *McGrew v. Missouri Pac. Ry. Co.*, 230 Mo. 496, 132 S.W. 1076, 1083-1084. See also *State v. Shelby*, 333 Mo. 1036, 64 S.W. 2d 269, 271 [1-4]; *State ex rel. Hughes v. Southwestern Bell Telephone Co.*, 352 Mo. 715, 179 S.W. 2d 77, 80 [3-5]. \* \* \*

In *State ex rel Cole v. Matthews*, 274 SW 2d 286, the question before the court concerned the purchase of voting machines, by the Election Board of St. Louis County. The court held that the Board of Election Commissioners by statute was vested with authority to designate the type and number of machines to be purchased and used. It was the duty and responsibility of the county council to pay for the purchase and rental of such machines. In discussing the authority granted the council under the above constitutional provision, the Supreme Court said, l. c. 292:

"[4-6] Respondents also invoke the provisions of Art. III, §26, of the Charter and Ordinance No. 46 of the County of St. Louis as authorizing them to designate the type and number of machines to be purchased and used. The charter authorizes the Council to establish procedures governing the making of county purchases. The ordinance, enacted pursuant to the charter provision, creates a Division of Purchasing, and provides 'all bids for any \* \* \* purchase may be rejected and new bids advertised for at the discretion of the Supervisor.' The provisions of the charter and ordinances of the county which

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are in conflict with prior or subsequent state statutes relating to governmental matters must yield. State ex rel. Volker v. Carey, 345 Mo. 811, 136 S.W. 2d 324, 325 [4]; Kansas City v. J. I. Case Threshing Machine Co., 337 Mo. 913, 87 S.W. 2d 195, 202, 203 [8,9]. Statutes pertaining to the conduct of elections are governmental in scope. See last case above cited. But, in any event, neither the charter nor the ordinance directly or impliedly vests respondents with any discretion other than to purchase at the best bid obtainable."

The principle is well settled that the Constitution of Missouri is in the main a limitation on the power of the legislature. The legislature has full power unless the Constitution limits that power. State ex rel Gordon v. Becker, 49 SW2d 146.

The significant limitation in Section 18(e), Article VI, upon the power of the legislature is that "no law shall provide for any other office or employee of the county or fix the salary of any of its officers or employees". This language cannot be construed to deny to the legislature the power to direct a charter county to have a full time prosecuting attorney to enforce the criminal and other laws of the state.

It has long been held by the Supreme Court under the express language of Section 19, Article VI, respecting Constitutional Charter Cities that the City Charter and ordinances can adopt any provision or enact any ordinance so long as it is "consistent with and subject to the laws of the state."

In Coleman v. Kansas City, 182 SW 2d 74, 1.c. 77, the Supreme Court en banc said:

"\* \* \*We discussed the matter fully in those cases and our ruling is to the effect that as to matters pertaining to private, local corporate functions the city holds its power independent of control by the General Assembly, but as to governmental functions the State retains control. On this point the city's argument is wholly based on the fact that the license taxes are used exclusively for municipal purposes. That fact is not determinative. The

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distinction is not between local and general concern, but between corporate and governmental functions. The power of taxation is a governmental function which the constitution authorizes the General Assembly to delegate to the city as to municipal taxes, but only in a manner 'consistent with and subject to the Constitution and laws of the State.'"

In State ex rel Spink v. Kemp, 283 SW 2d 502, l.c. 515 the Supreme Court En Banc said:

"In State ex rel. Carpenter v. City of St. Louis, 318 Mo. 870, 2 S.W. 2d 713, 721, we said: 'The cases construing the police laws are in point. The state has authority to provide by general law for the establishment of a metropolitan police force in a city operating under a special charter, and compel the city to maintain it by taxation \* \* \* In State ex rel [Hawes] v. Mason, 153 Mo. 23, 54 S.W. [524] 527, it was held that the city of St. Louis could be compelled, by mandamus to pay the expense of the police system of that city, established by an act of the Legislature (Laws 1860-61, p. 446). It is significant that the original legislative act supplanted the municipal system which had existed prior to that time. Id., [153 Mo. 23] loc. cit. 32 (54 S.W. 524). The opinion written by Judge Gantt, referring to earlier cases, says ([153 Mo.] loc. cit. 47 [54 S.W. 530]): "The power of the Legislature to provide the necessary agencies to perform the high functions of the state in the preservation of \* \* \* peace, etc., and to impose the duty of paying therefor on the locality for which \* \* \* said agencies were created, was fully and firmly established."'

"The cases cited by the Special Commissioner and relied upon by respondents do not militate against the doctrine above announced. Each of them recognizes and holds inviolable the rule

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that the charter of a city (organized as is Kansas City) is subordinate to the will of the General Assembly insofar as it relates to governmental policy as distinguished from matters of local municipal concern." (Emphasis ours)

And again most recently in *School District of Kansas City v. Kansas City*, 382 SW 2d 688, the Supreme Court en banc said, 1.c. 692:

"[3] The Charter of Kansas City was adopted pursuant to constitutional provisions which are not §§ 18 and 20 of Art. 6 of the 1945 Constitution. Section 19 requires that the Charter be 'consistent with and subject to the constitution and laws of the state'. In case of conflicting or inconsistent provisions, the Charter must give way to the Constitution and state laws in regard to governmental functions or general policies of statewide concern. *State ex rel. Rothrum v. Darby*, 345 Mo. 1002, 137 SW 2d 532, 537 [6]; *State ex rel. Spink v. Kemp*, 365 Mo. 368, 283 S.W. 2d 502, 514 [4-6]; *City of Joplin v. Industrial Commission of Missouri*, Mo., 329 S.W. 2d 687, 693 [7]." (Emphasis ours)

We think the law respecting Constitutional Charter Counties is analogous to the law in Constitutional Charter Cities as announced in the cases above cited.

Charter counties authorized by Section 18(a) Article VI, are subject to laws enacted by the legislature. This is implicit in the language of Section 18(b) Article VI when it provides that a County Charter shall provide "for the exercise of all powers and duties of counties and county officers prescribed by the Constitution and laws of the state." The superiority of state law is recognized in the St. Louis County Charter in Article III, Section 22, Paragraph 24, "To exercise all powers of legislation now or hereafter conferred upon counties by the Constitution, law and this charter \* \* \*."

The almost exclusive function of a Prosecuting Attorney is to prosecute and enforce the criminal laws enacted by the legislature. This is an exercise of the sovereign power of the state delegated by the legislature to the respective prosecuting attorneys of the state.

Honorable Maurice Schechter


The legislature has the power to determine that the needs of an urban population are so urgent that it may require the prosecuting attorney to devote his full and entire energy to the prosecution of persons accused of violation of the criminal laws. To hold otherwise would require that Senate Bill 7 be deemed unconstitutional. The only constitutional limitation bearing on this is the last clause of Section 18(e), Article VI, which provides "but no law shall provide for any other office or employee of the county or fix the salary of any of its officers or employees." Senate Bill 7 does not provide for another office or employee and as applied to St. Louis County does not fix the salary of the Prosecuting Attorney. No other constitutional limitation or prohibition has been pointed out to us and we have found none. We must therefore conclude that Senate Bill 7 is not unconstitutional and if enacted would be operative in St. Louis County.

#### CONCLUSION

It is the opinion of this office that the legislature may validly pass a statute requiring the Prosecuting Attorney of a Constitutional Charter County to devote full time to his duties, and prohibit him from engaging in the practice of law.

The foregoing opinion which I hereby approve, was prepared by my Assistant J. Gordon Siddens.

Yours very truly,

  
NORMAN H. ANDERSON  
Attorney General



June 24, 1966



Mr. Lowell McCuskey  
Prosecuting Attorney  
Osage County  
Linn, Missouri

Dear Mr. McCuskey:

This is in response to your request for an opinion involving the interpretation of Section 241.290, RSMo 1959, relative to abandoned riverbeds and islands. This section states as follows:

"All lands belonging to the state, not otherwise appropriated under the laws thereof, which have been formed by the recession and abandonment of their waters of the old beds of lakes and rivers in this state, or by the formation of islands in the navigable waters of the state, are hereby granted and transferred to the respective counties in which such lands are located, to be held by such counties for school purposes."

We note that Section 241.300 is of similar context and relates to future abandoned riverbeds and islands.

Specifically, you state that there is an increase in alluvion to the lands of certain riparian owners adjoining the Missouri River as a result of revetments constructed by the Corps of Engineers. The question is, whether the county court has acquired any interest that they can convey.

It is my understanding that the land involved literally adjoins the Missouri River.

Honorable Lowell McCuskey

Of course the legal boundaries of the private lands are of importance. In *Volkerding v. Brooks*, 359 S.W.2d 736 (1962), at l.c. 742, the court stated:

"It is fundamental in the law of accretions that the lands to which they attach must be bounded by the river or stream to entitle its owner to such increase. \* \* \* In the very nature of things, then, accretions depend upon actual contiguity, without separation of the claimant's land from the accumulated alluvion by the lands of another, however narrow the intervening strip may be, or whatever the size of the claimant's tract behind it." \* \* \*

It is clear that we must draw a distinction between the formation of land contemplated by Sections 241.290, 241.300 and accretions.

Both sections are based upon the fundamental proposition that the State holds title to the land beneath the navigable waters and therefore by statute may, as it did, pass title to islands formed in such waters or lands formed by recession and abandonment of the waters of old beds of lakes and rivers. These sections, however, relate to specific formations and do not refer to accretions. The right of the adjoining landowner to the alluvion is not affected by the statute. In the *Volkerding* case and in other opinions, the courts have recognized that in Missouri a riparian owner owns to the low watermark on navigable streams.

The courts have stated that insofar as navigable waters are concerned, accretions become the property of the riparian landowner. *Dumm v. Cole County*, 287 S.W. 445 (1926).

We think that it is clear that neither Section 241.290 nor Section 241.300 affects the right of the adjoining landowner to the alluvion. *Conran v. Girvin*, 341 S.W.2d 75 (1960), is a comprehensive and extensive authority on many of the problems involved.

Mr. Lowell McCuskey

The county has no right to the alluvion formed by accretion to the lands of riparian owners and it necessarily follows that the county court has no title to convey.

Yours very truly,

NORMAN H. ANDERSON  
Attorney General

JCK:df

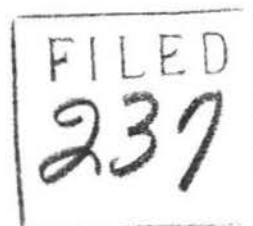
STATE REPRESENTATIVES:  
HOUSE OF REPRESENTATIVES:  
FILING:  
CANDIDATES:

Declarations of candidacy that have heretofore been filed with the Secretary of State for the Office of State Representative, prior to the filing by the House Apportionment Commission of its final report with the Secretary of State, are invalid.

March 22, 1966

OPINION NO. 237

Honorable James C. Kirkpatrick  
Secretary of State  
Capitol Building  
Jefferson City, Missouri



Dear Mr. Kirkpatrick:

This is in response to your request for an opinion dated March 16, 1966, on the following questions:

"1. Whether filings heretofore made with the Secretary of State for the office of State Representative are valid?"

"2. Whether filings heretofore made with the Secretary of State for the Office of State Representative for any district in which the filer resides, as may be established by the reapportionment process are valid?"

At the Special Election on January 14, 1966, the people adopted amendments to Article III of the Constitution relating to the apportionment of the House of Representatives. Section 3 of Article III relates to the time limits affecting the First Commission to Apportion the House of Representatives and provides:

"Excepting only the time limits prescribed in this section, all provisions of Section 2 shall apply."

Section 2, Article III, of the Constitution, as amended, provides:

"The commission shall reapportion the representatives by dividing the population of the

Honorable James C. Kirkpatrick

state by the number one hundred sixty-  
three and shall establish each district \* \* \*."

Said Section 2, Article III further provides:

"Not later than six months after the appointment of the commission, the commission shall file with the Secretary of State a final statement of the numbers and boundaries of the districts together with a map of the districts \* \* \*."

After the statement is filed members of the house of representatives shall be elected according to such districts until a reapportionment is made as herein provided, \* \* \*."

It is clear from the provisions of the Constitution, as amended, above noted, that House of Representative districts come into existence when the apportionment commission files its final report with the Secretary of State.

This office on December 27, 1961, issued Opinion No. 64 to George H. Morgan in ruling upon a similar question applicable to declarations of candidacy for nomination for senator and representative following the 1960 census, said:

"Therefore, in the opinion of this office, any declaration of candidacy filed before the new districts have been created is a nullity, there being no office in existence for which the candidate may seek nomination."

Also, an opinion of this office, No. 220, dated May 21, 1962, to Edgar J. Keating, dealing with filing for the office of constable before the date magistrate districts were established pursuant to the applicable provisions of the statute this office ruled:

"Hence, it is our opinion that until the new magistrate districts were created, any declaration of candidacy for the office of constable theretofore filed is a nullity, there being no office in existence for which the candidate may seek nomination. \* \* \*"

Honorable James C. Kirkpatrick

It is therefore clear that declarations of candidacy that have heretofore been filed with the Secretary of State for the Office of State Representative, prior to the filing by the House Apportionment Commission of its final report with the Secretary of State are invalid.


With respect to the answer to your second question, it is answered by the above answer to the first question and is likewise in the negative.

CONCLUSION

It is therefore the opinion of this office that declarations of candidacy that have heretofore been filed with the Secretary of State for the Office of State Representative, prior to the filing by the House Apportionment Commission of its final report with the Secretary of State, are invalid.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, J. Gordon Siddens.

Yours very truly,

  
NORMAN H. ANDERSON  
Attorney General



JUNIOR COLLEGE DISTRICTS:  
ADULT EDUCATION:  
SCHOOLS:  
COOPERATIVE AGREEMENTS:  
FEDERAL GOVERNMENT:

(1) A junior college district has the power to provide adult basic education for residents without regard to age; (2) Junior college districts are authorized to provide adult education gratuitously out of revenues derived by the school dis-

trict from sources other than those described in Article IX, Section 3, of the State Constitution, and only with revenues which are not required for the establishing and maintaining of free public schools for persons between the ages of 6 and 20 years; (3) Junior college districts can contact and cooperate with the Federal Government and provide a local matching share in cash for adult basic education programs under the Economic Opportunity Act of 1964; (4) A junior college district may accept donations of money which are given to provide for the financing of an adult basic education program.

OPINION NO. 239

April 26, 1966

Honorable Warren E. Hearnes  
Governor of Missouri  
Executive Office  
Jefferson City, Missouri



Dear Governor Hearnes:

This opinion is issued in response to your request dated March 9, 1966. Your letter sets forth four questions regarding the power of junior college districts to participate in adult basic education programs under the Economic Opportunity Act of 1964. Your letter states as follows:

"Section 212 of the Economic Opportunity Act of 1964 as amended provides for the availability of federal monies on a 90-10 matching basis for local school districts to provide an Adult Basic Education Program.

"There seems to be a question of interpretation of state law on whether these funds can be legally spent by junior college districts. Therefore, I request that an Attorney General's Opinion be rendered concerning the following questions:

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1. Can a junior college district provide gratuitous basic education for those over 21, provided that no state funds specified in Section 3, Article IX of the Constitution of the State of Missouri are used?
2. In federally financed adult education programs which require a local matching share of 10% cash, such as those authorized under Title IIB of the Economic Opportunity Act of 1964 (Section 212), may a local junior college district provide a matching amount in cash?
3. Can the matching amount referred to in question number 2 be provided by a municipality or a private party if it is turned over to the local junior college district for that purpose?
4. If the above can be answered in the affirmative, can a junior college district provide basic education for adults without a high school education?"

Adult basic education is described in Section 212, of the Economic Opportunity Act of 1964, Public Law 88-452 as follows:

"It is the purpose of this part to initiate programs of instruction for individuals who have attained age eighteen and whose inability to read and write the English language constitutes a substantial impairment of their ability to get or retain employment commensurate with their real ability, so as to help eliminate such inability and raise the level of education of such individuals with a view to making them less likely to become dependent on others, improving their ability to benefit from occupational training and otherwise increasing their opportunities for more productive and profitable employment, and making them better able to meet their adult responsibilities."

The Federal Government will provide grants covering 90% of the cost of these programs. Section 216(b), Public Law 88-452, as amended.

Honorable Warren E. Hearnes, Governor

I.

Your first and fourth questions will be considered together:

Junior college districts are provided for under Sections 178.770 to 178.890, RSMo. Supp. 1965.

Section 178.770(2), provides:

"2. When a district is organized, it shall be a body corporate and a subdivision of the state of Missouri and shall be known as 'The Junior College District of ....., Missouri' and, in that name, may sue and be sued, levy and collect taxes within the limitations of sections 178.770 to 178.890, issue bonds and possess the same corporate powers as common and six-director school districts in this state, other than urban districts, except as herein otherwise provided."

Since this section provides that junior college districts shall have the same corporate powers as common and six-director school districts, we shall first determine whether or not a common or six-director school district has the power to provide gratuitous adult basic education to those over 21.

Recently, upon your inquiry, this office officially ruled that the power of a school district to provide for the education of all residents without regard to ages is necessarily implied in the statutes creating school districts (Opinion No. 100, Hearnes, 1-18-66, copy enclosed).

Thus, a public school district has the power to provide for the education of all residents. This power includes the providing of adult basic education for those over age 21.

Article IX, Section 1(b), Missouri Constitution 1945, provides, "Adult education may be provided from funds other than ordinary school revenues."

Section 171.091, RSMo. Supp. 1956, provides:

Honorable Warren E. Hearnes, Governor

"The school board of any school district in this state may provide for the gratuitous education of persons between five and six and over twenty years of age, resident in the school district. The gratuitous education, however, shall be provided only out of revenues derived by the school district from sources other than those described in section 3, article IX, of the constitution of this state, and only with revenues which are not required for the establishing and maintaining of free public schools in the school district for the gratuitous instruction of persons between the ages of six and twenty years."

Section 171.091, expressly authorizes public school districts to provide such services gratuitously except out of certain revenues therein mentioned.

As provided by Section 178.770, junior college districts have these same powers as common and six-director school districts unless these powers are taken away by some provision of the junior college district law. Thus, we shall turn to a further consideration of the junior college district statutes.

Section 178.780(2), provides:

"The state board of education shall:

(1) Establish the role of the two-year college in the state; \* \* \*

Pursuant to this statutory provision the State Board of Education has described the role of the public junior college in its publication, "Public Junior Colleges in Missouri", as follows:

#### "THE ROLE OF THE PUBLIC JUNIOR COLLEGE

"The public junior college is defined as follows:

"A public educational institution offering instruction, beyond a four-year standard high school course, in programs of two years duration. Primarily, these programs are at the collegiate level and qualify for appropriate accreditation, but other types of courses for youth and adults may be provided to meet local needs. The curriculum may be specialized or comprehensive in scope and character depending on the needs and desires of the community

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served. It may offer for college credit transfer courses or terminal courses, or both. It may specialize in the liberal arts and sciences type programs, or the technical institute type programs, or it may be a comprehensive type institution offering a wide range of programs.

"The junior college district is the basic governmental unit for control, financial support and source of students.

"The primary objectives of the junior college shall be:

1. To make two-year college education available to able students in their home environment;
2. To provide regular full-time students with diversified programs of studies leading to appropriately varied educational and vocational goals, including transfer to other institutions;
3. To provide part-time students with diversified programs of studies leading to appropriately varied educational and vocational goals, including transfer to other institutions;
4. To provide effective programs of scholastic, vocational and personal guidance and flexibility of transfer among programs so that the students may have the opportunity to develop their potentialities to the utmost;
5. To provide for local as well as state and national needs appropriate for this type of institution;
6. To supplement educational opportunities now available in the State."

As manifest by this declaration of the State Board of Education, although the public junior college primarily is to provide collegiate level education, it is further the role of the junior

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college to provide "other types of courses for youth and adults [which] meet local needs."

Another of the objectives of junior colleges is to provide vocational and terminal technical courses. Certainly an ability to read and write the English language is a fundamental vocational necessity.

Section 178.850, provides:

"A junior college district organized under sections 178.770 to 178.890 shall provide instruction, classes, school or schools for pupils resident within the junior college district who have completed an approved high school course. \* \* \* " (Emphasis added.)

We are of the opinion that this section in no way derogates the power of a junior college district to provide education to those not having completed an approved high school course. As is seen in Section 212, of Public Law 88-452, the adult basic education programs would include one who has completed high school. Presumably, such person would have the ability to read and write the English language.

The purpose of Section 178.850 is to prescribe which persons a junior college district has a duty to provide the instruction. Note that the above quoted provision of that statute uses the mandatory verb "shall." It would follow from this provision that junior college districts do not have a duty to instruct a resident who has not completed high school; however, it does not follow that junior college districts do not have the power to provide, at their discretion, instruction to those not having completed high school.

Therefore, we are of the opinion that a junior college district has the power to provide adult basic education courses to those who have not (or have) completed an approved high school course; and further, that such services may be provided gratuitously out of revenues other than those excepted by Section 171.091.

## II.

Your second question notes that under the Federal law a local matching share of 10% cash is required. You ask,



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"may a local junior college district provide a matching amount in cash?"

Having concluded above that a junior college district could provide an adult basic education program gratuitously, 100% out of its own revenue (other than those excepted by Section 171.091), it necessarily follows that a junior college district may pay 10% of the cost of a program operated in co-operation with the Federal Government.

This office ruled in Opinion 100, supra, that school districts have the power to contract and cooperate with the Federal Government. Section 70.220, RSMo 1959. Article VI, Section 16, Missouri Constitution 1945. Junior college districts also have this power.

### III.

Your third question is: Can the matching 10% be provided by a municipality or a private party if turned over to the local junior college district for that purpose?

Section 165.011, RSMo. Supp. 1965, provides:

" \* \* \* Money donated to the school districts shall be placed to the credit of the fund where it can be expended to meet the purpose for which it was donated and accepted. \* \* \*"

By reference this statute also applies to junior college districts, Section 178.770.

Therefore, a junior college district has the power to accept a gift of money and to expend it for the purpose for which it was donated.

Whether or not a municipality or other political subdivision has the power to make such a grant will depend, of course, on the law relevant to the particular municipality or other political subdivision. We make no ruling whatsoever on that question here.

### CONCLUSION

Therefore, it is the opinion of this office that:

1. A junior college district has the power to provide adult basic education for residents without regard to age;

Honorable Warren E. Hearnes, Governor

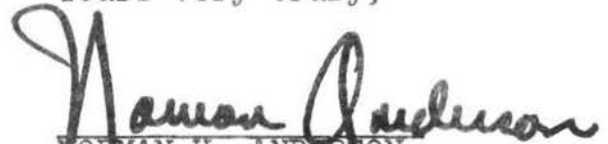
2. Junior college districts are authorized to provide adult education gratuitously out of revenues derived by the school district from sources other than those described in Article IX, Section 3, of the State Constitution, and only with revenues which are not required for the establishing and maintaining of free public schools for persons between the ages of 6 and 20 years;

3. Junior college districts can contract and cooperate with the Federal Government and provide a local matching share in cash for adult basic education programs under the Economic Opportunity Act of 1964;

4. A junior college district may accept donations of money which are given to provide for the financing of an adult basic education program.

The foregoing opinion, which I hereby approve, was prepared by my assistant Louis C. DeFeo, Jr.

Yours very truly,

  
NORMAN H. ANDERSON  
Attorney General

LCD:df

Enclosure: Opinion No. 100,  
Hearnes, 1/18/66.

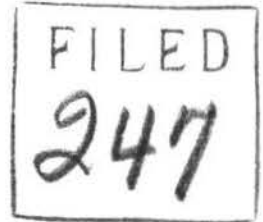
MERCHANTS:  
TAXATION:  
CONSIGNMENT:

Those dealers are liable for the merchants tax set out in Chapter 150, RSMo, upon goods stored in a warehouse pursuant to a consignment agreement between such dealers and the shippers of such goods, such agreement providing that the dealers have control of such goods and, whereunder such dealers may remove goods from the warehouse to be placed for sale by the dealers from time to time as needed.

OPINION NO. 247

September 1, 1966

Honorable Jack Lukehart  
Prosecuting Attorney  
Chariton County  
Keytesville, Missouri



Dear Mr. Lukehart:

You have requested an opinion of this office concerning the merchants tax under Chapter 150, RSMo. You state that three companies, none of which has an office in Chariton County, ship fertilizer and associated products to a warehouse at Brunswick in Chariton County, on consignment to various dealers. The dealers obtain these products from the warehouse as they need them. You further state that actual title to the merchandise is not in the dealer until he goes to the warehouse and obtains the merchandise in order to take it to his store for sale.

At least one of the consignment agreements between shippers and dealers reads in part as follows:

"You agree to unload upon arrival at destination and to keep clear of demurrage, securely stored, stacked and segregated from goods of yourself and others, all goods consigned by us to you without charge to us. You agree to pay us in full for loss of or damage to, in or to any of our goods in your possession or control, except loss or damage by flood or by fire without your fault.\* \* \*"  
(Emphasis added)

We base our opinion on the factual situation as shown by the quoted language; that is, we assume as to all dealers that the goods are consigned to the dealer and that the dealer has under the provisions of such contract, control and responsibility for the goods.

Section 150.040, RSMo requires that:

"Merchants shall pay an ad valorem tax equal to that which is levied upon real estate, on the highest amount of all goods, wares and merchandise which they may have in their possession or under their control, whether owned by them or consigned to them for sale, at any time between the first Monday in January and the first Monday in April in each year . . . " (Emphasis added)

The term "merchant" is defined in Section 150.101, RSMo as follows:

"Every person, corporation, copartnership or association of persons, who shall deal in the selling of goods, wares and merchandise at any store, stand or place occupied for that purpose . . . "

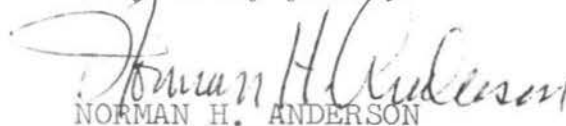
The dealers in question have under the above quoted language of the consignment contracts control over and responsibility for the goods consigned. Thus, the contracts obviously give control of the goods to the merchants even though they do not have possession and the statutory requirements are met, subjecting them to liability for the merchants tax.

#### CONCLUSION

It is the opinion of the Attorney General that dealers are liable for the merchants tax set out in Chapter 150, RSMo upon goods stored in a warehouse pursuant to a consignment agreement between such dealers and the shippers of such goods, such agreement providing that the dealers have control of such goods and whereunder such dealers may remove goods from the warehouse to be placed for sale by the dealers from time to time as needed.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Donald L. Randolph.

Very truly yours,

  
NORMAN H. ANDERSON  
Attorney General

AIR CONSERVATION COMMISSION:  
MERIT SYSTEM:

1. The position of executive secretary to the Air Conservation Commission is a merit system employee.  
2. The secretary of the executive secretary is a merit system employee. 3. All other employees of the Air Conservation Commission are merit system employees except those specifically exempted by Section 191.070, RSMo 1959. 4. The Air Conservation Commission has the power under Section 203.040(4), RSMo Cum. Supp. 1965, to fix the salary of the executive secretary, not to exceed twelve thousand dollars per annum.

Opinion No. 249

June 7, 1966



Honorable Lewis C. Green  
Chairman of Air Conservation Commission  
State of Missouri  
Missouri Division of Health  
State Office Building  
Jefferson City, Missouri

Dear Mr. Green:

This is in answer to your request for an opinion which reads as follows:

"The Air Conservation Commission has unanimously requested that I request the opinion of the Attorney General on the following three questions:

1. Is the position of executive secretary to the Air Conservation Commission a Merit System employee?
2. Is his secretary a Merit System employee?
3. Are other persons who may be hired by the Air Conservation Commission Merit System employees?

We will appreciate your prompt attention to this request."

Section 36.030, RSMo 1959, of the State Merit System Law reads in part as follows:

- "1. A system of personnel administration

based on merit principles and designed to secure efficient administration is established for all offices, positions and employees of the state department of public health and welfare, \* \* \*"

The Department of Public Health and Welfare is composed of three divisions, one of them being the Division of Health. Section 191.010, RSMo 1959.

Section 203.040, RSMo Cum. Supp. 1965, of the Missouri Air Conservation Law enacted in 1965 reads in part as follows:

"1. There is created hereby an air pollution control agency to be known as the 'Air Conservation Commission of the State of Missouri', whose domicile for the purposes of this chapter shall be deemed to be that of the division of health of the department of public health and welfare of the state of Missouri. \* \* \*"

\* \* \* \* \*

"4. The commission shall appoint an executive secretary who shall be a full-time employee of the division of health and who shall act as its administrative agent. The commission shall determine the compensation of, and pay from available appropriations for the executive secretary, but not to exceed the sum of twelve thousand dollars per annum."

It is our opinion that employees of the Air Conservation Commission, by virtue of being domiciled in the Division of Health of the Department of Public Health and Welfare are, with certain exceptions, under the merit system.

Section 36.030 (1), supra, excepts certain specific types of employees from the merit system. However Section 191.070, RSMo 1959, also makes specific exemptions for employees of the Department of Public Health and Welfare. Enclosed is Attorney General Opinion, dated January 29, 1960, to the Honorable N. F. Steenberger which states, in relation to employees of the Water Pollution Board, that Section 191.070 is a special law and Section 36.030, supra, is a general law, and therefore, Section 191.070 prevails. We adhere to that opinion and find that to



this extent it applies here.

Therefore, the only employees of the Air Conservation Commission not under the merit system are those exempted by Section 191.070, supra, which reads in part as follows:

"1. All employees of the department of public health and welfare, except the department director, the division directors, and one secretary for each director, chaplains, patients or inmates of state charitable institutions who may also be employees in such institutions, and persons employed in an internship capacity as a part of their formal training leading to an academic degree, shall be selected in accordance with the state merit system law, notwithstanding that such office, position, or employment may be specifically exempted under the state merit system law. Such employees shall be persons of good character and integrity and residents of this state for one year, except that residence in this state shall not be necessary in cases of appointment of physicians, nurses, technicians, dietitians, and other professionally trained personnel."

The executive secretary, then, is a merit system employee, but the Air Conservation Commission by virtue of Section 203.040 (4), supra, as appointing authority has the power to fix his salary, not to exceed twelve thousand dollars per annum.

#### CONCLUSION

It is the opinion of this office that:

1. The position of executive secretary to the Air Conservation Commission is a merit system employee;
2. The secretary of the executive secretary is a merit system employee;

Honorable Lewis C. Green

3. All other employees of the Air Conservation Commission are merit system employees except those specifically exempted by Section 191.070, RSMo 1959.

4. The Air Conservation Commission has the power under Section 203.040(4), RSMo Cum. Supp. 1965, to fix the salary of the executive secretary, not to exceed twelve thousand dollars per annum.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Walter W. Nowotny, Jr.

Yours very truly

A handwritten signature in dark ink, appearing to read "Norman H. Anderson", written over the typed name.

NORMAN H. ANDERSON  
Attorney General

Enclosure (opinion):  
Steenberger, 1/29/60

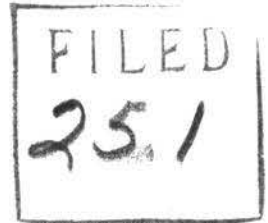
VOTING:  
MILITARY PERSONNEL:  
NON-PAYMENT OF TAXES:

Military Personnel, at Fort Leonard Wood who are qualified may register and vote in County where reservation is located, if they have established residence in the State of Missouri. Non-payment of taxes cannot disqualify them.

Opinion No. 251

July 14, 1966

Honorable Arthur B. Cohn  
Pulaski County Prosecuting Attorney  
Waynesville, Missouri



Dear Mr. Cohn:

We are in receipt of your letter of March 24, 1966, wherein you request an opinion from this office. Your letter is as follows:

"\* \* \* Would you please furnish me with an opinion on whether or not military personnel living on the reservation of Ft. Leonard Wood would be entitled to register and vote in local elections if they have resided on the military reservation for a year or longer. Also, I would like to know in this opinion whether or not military personnel who have the required time in the state of Missouri, and who are residing on the military reservation are entitled to vote if they do not pay taxes in the county."

First, you inquire as to the rights of military personnel to register and vote in the county in which a federal reservation is located.

Article VIII, Section 2 of the Constitution of the State of Missouri as amended, is as follows:

"All citizens of the United States, including occupants of soldiers' and sailors' homes, over the age of twenty-one who have resided in this state one year, and in the county, city or town sixty days next preceding the election at which they offer to vote, are entitled to vote at all elections by the people. Citizens of the United States who are otherwise qualified to vote under this section and who have resided in this state sixty days or more, but less than one year, prior to the date of a presidential election may be permitted by law to vote for presidential and vice presidential electors at

such election but for no other officers. No idiot, no person who has a guardian of his or her estate or person and no person while kept in any poorhouse at public expense or while confined in any public prison shall be entitled to vote, and persons convicted of felony, or crime connected with the exercise of the right of suffrage may be excluded by law from voting. All persons voting for the presidential and vice presidential electors under the sixty day resident provision shall sign an affidavit as to their eligibility to vote under said section, and any person who falsifies said affidavit shall, upon conviction, be deemed guilty of a felony."

Section 111.060 RSMo., 1959, also sets forth the qualifications of voters in this state. It is as follows:

"All citizens of the United States, including residents of soldiers' and sailors' homes, over the age of twenty-one years who have resided in this state one year, and the county, city or town sixty days immediately preceding the election at which they offer to vote, and no other person shall be entitled to vote at all elections by the people. Each voter shall vote only in the township in which he resides, or if in a town or city, then in the election district therein in which he resides. No idiot, no insane person and no person while kept in any poorhouse at public expense or while confined in any public prison shall be entitled to vote at any election under the laws of this state; nor shall any person convicted of a felony, or of a misdemeanor connected with the exercise of the right of suffrage, be permitted to vote at any election unless he shall have been granted a full pardon; and after a second conviction of felony or of a misdemeanor connected with the exercise of the right of suffrage, he shall be forever excluded from voting."

It will be seen from a reading of these two authorities that the only requirement is that a voter be a citizen of the United States, over the age of twenty-one, and a resident of this state at least one year, and in the county, city or town sixty days, all preceding the election at which he intends to vote. In a presidential election they may vote if a resident of the state at least sixty days prior to the election date.

The only question to be resolved is whether or not a military reservation or post is "in the state."

This office issued an opinion, No. 185, on November 27, 1963, directed to Honorable Paxton P. Price, State Librarian. Although this opinion was not on the precise question under discussion here, the opinion discussed at length the right to vote of military personnel, who reside on United States bases, and who are qualified under Article VIII, Section 2, and Section 111.060, as set forth above. A copy of this opinion is attached hereto. The opinion concludes that persons residing on territory of federal military bases may be entitled to vote within the states, where the bases are located for the reason that such persons are living in and can establish residence in such states. See p. 5 of the attached opinion and the authorities cited therein.

In the very recent case of Harper vs. Virginia State Board of Elections, 16 L. ed. 2d 169, 86 Supreme Court Reporter 1079, the United States Supreme Court held that voter qualifications which were discriminatory are contrary to the 14th amendment of the Constitution of the United States. The Court said Sup. Ct. Rep. 1.c. 1081:

"\* \* \* Our cases demonstrate that the Equal Protection Clause of the Fourteenth Amendment restrains the States from fixing voter qualifications which invidiously discriminate. Thus without questioning the power of a State to impose reasonable residence restrictions on the availability of the ballot (see Pope v. Williams 193 U.S. 621), we held in Carrington v. Rash, 380 U.S. 89, that a State may not deny the opportunity to vote to a bona fide resident merely because he is a member of the armed services. 'By forbidding a soldier ever to controvert the presumption of non-residence, the Texas Constitution imposes an invidious discrimination in violation of the Fourteenth Amendment.' Id., at 96. And see Louisiana v. United States, 380 U. S. 145. Previously

Honorable Arthur B. Cohn

we had said that neither homesite nor occupation 'affords a permissible basis for distinguishing between qualified voters within the State.' Gray v. Sanders, 372 U. S. 368, 380. We think the same must be true of requirements of wealth or affluence or payment of a fee."

Your second question is, may military personnel, who have resided on a military reservation for the required time, vote, "if they do not pay taxes in the county."

There is no statute in this state requiring the payment of any taxes as a pre-requisite to voting, and our courts have held that such a requirement cannot be imposed.

The Harper case, supra, also held that the requirement that a poll tax be paid as a condition to the exercise of the franchise violated the United States Constitution, 1. c. 1081:

"We conclude that a state violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard. Voter qualifications have no relation to wealth nor to paying this or any other tax."

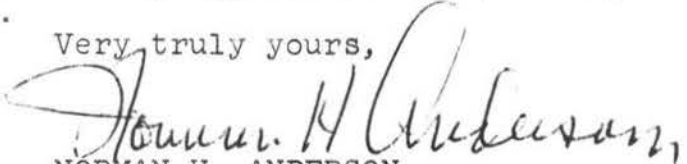
#### CONCLUSION

It is the opinion of this office that military personnel, stationed at Ft. Wood, who are otherwise qualified, may register and vote in the county in which the federal reservation is located, provided they have established residence in the State of Missouri.

It is the further opinion of this office that the non-payment of taxes cannot disqualify them.

The foregoing opinion which I hereby approve was prepared by my assistant, O. Hampton Stevens.

Very truly yours,

  
NORMAN H. ANDERSON  
Attorney General



CHAUFFEURS LICENSE:  
MOTOR VEHICLE OPERATORS  
LICENSE:  
DECAL:

It is unlawful for any person to display or permit to be displayed, or to have in his possession any chauffeur's license or motor vehicle operator's license knowing the same to have been altered by the affixing thereto of a decal.

November 22, 1966

OPINION NO. 252

Mr. Paul M. Peterson, General Counsel  
University of Missouri  
1 Tate Hall  
Columbia, Missouri



Dear Mr. Peterson:

This is in response to your letter of March 28, 1966, requesting an official opinion of this office.

Essentially the question raised by your letter concerns the legality of attaching a small decal to a motor vehicle operator's license by an individual who wishes to make a gift of his eyes to the Lion's Eye Tissue Bank.

Section 302.220, RSMo 1959, reads in part as follows:

"It shall be unlawful for any person to display or permit to be displayed, or to have in his possession, any chauffeur's license or motor vehicle operator's license knowing the same to be fictitious or to have been cancelled, suspended, revoked or altered; \* \* \*" (Emphasis ours)

The verb "alter" is defined at C.J.S., 898, as follows:

"To add or diminish to cause to be different in some respect to change; to change in some respect either partially or wholly; to change or modify the form or character of a thing, without changing its identity; \* \* \*" (Emphasis ours)

It is apparent that placing the proposed decal on the license would constitute an addition within the meaning of the foregoing definition.

Mr. Paul M. Peterson

The addition of the decal to the license would not constitute a material change, however it would vary and add to the appearance of the license to a marked degree. Likewise it would add information to the drivers license not expressly provided for or authorized by statute. (Section 302.171 and 302.181, RSMo 1959) We believe that this change in appearance would constitute an alteration of the operator's license.


We note that Section 302.220 does not prohibit the alteration of motor vehicle operators licenses, but said Section does declare the possession, display or permission to display a license that has been altered to be unlawful.

#### CONCLUSION

Therefore, it is the opinion of this office that it is unlawful for any person to display or permit to be displayed, or to have in his possession any chauffeur's license or motor vehicle operator's license knowing the same to have been altered by the affixing thereto of a decal.

The foregoing opinion which I hereby approve was prepared by my Assistant, Mr. Jerome Wallach.

Very truly yours,

  
NORMAN H. ANDERSON  
Attorney General

April 27, 1966

Opinion No. 257  
Answered By Letter  
(Mansur)



Honorable James L. Paul  
Prosecuting Attorney  
McDonald County  
Pineville, Missouri 64856

Dear Mr. Paul:

In your letter of March 31, 1966, you requested an opinion from this office as follows:

"I would appreciate as soon as possible, an opinion from your office construing Section 482.030 of Vernons Annotated Statutes of Missouri as to the following portion contained therein: '\*\*and shall be licensed to practice law in this state'.

"My question is, since the preceding qualification requires the Magistrate Judge to be 'a resident of the county for at least nine months, next, preceding his election', is it not true that he should also be licensed to practice law in this state for that same period of time."

Section 482.030, VAMS requiring judges of the magistrate courts in this state to have certain qualifications provides in part:

"1. Each judge of magistrate court shall be a qualified voter of this state, at least twenty-two years of age, and a resident of the county for at least nine months, next, preceding his election, and shall be licensed to practice law in this state; \* \* \*"

In construing the statute the primary rule is to ascertain the lawmakers intent from the words used and put upon the language

Honorable James L. Paul

used its plain and rational meaning so as to promote the object and manifest purpose of the statute. *Kansas City v. Travelers Insurance Company*, 284 S.W.2d 874.

It is the opinion of this department that the nine months provision in the above statute applies only to the residence requirement and does not apply to the license to practice law provision of said statute.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Moody Mansur.

Yours very truly,

NORMAN H. ANDERSON

MM:mm

FIREARMS - CONCEALABLE: Nonresident of this State may not acquire  
PERMIT TO OBTAIN: a permit to obtain firearms of a conceal-  
able nature.

OPINION NO. 260

May 26, 1966

Honorable Bill Burlison  
Prosecuting Attorney  
Cape Girardeau County  
708 Broadway  
Cape Girardeau, Missouri



Dear Mr. Burlison:

Your request for an official opinion of this office, dated April 1, 1966, is as follows:

"Federal and state law enforcement officers with whom I work desire to know whether a non-resident of Missouri is required to obtain the permit required of Section 564.630, Missouri Revised Statutes - 1959, pursuant to acquisition of small arms in the state of Missouri. If he is so required where should he obtain the permit?"

Section 564.620, RSMo 1959 provides:

"No wholesaler or dealer therein shall have in his possession for the purpose of sale, or shall sell, any pistol, revolver, or other firearm of a size which may be concealed upon the person, which does not have plainly and permanently stamped upon the metallic portion thereof, the trademark or name of the maker, the model and the serial factory number thereof, which number shall not be the same as that of any other such weapon of the same model made by the same maker, and the maker, and no wholesale or retail dealer therein shall have in his possession for the purpose of sale, or shall sell, any such weapon unless he keep a full and complete record of such description of such weapon, the name and address of the person from whom purchased and to whom sold, the date of such purchase or sale, and in the case of retailers the date of the permit and the name of the circuit clerk granting the same, which record shall be open to inspection at all times by any police officer or other peace officer of this state."

Honorable Bill Burlison

Section 564.630, RSMo 1959, states:

"1. No person, other than a manufacturer or wholesaler thereof to or from a wholesale or retail dealer therein, for the purposes of commerce, shall directly or indirectly buy, sell, borrow, loan, give away, trade, barter, deliver or receive, in this state, any pistol, revolver or other firearm of a size which may be concealed upon the person, unless the buyer, borrower or person receiving such weapon shall first obtain and deliver to, and the same be demanded and received by, the seller, loaner, or person delivering such weapon, within thirty days after the issuance thereof, a permit authorizing such person to acquire such weapon.

"2. Such permit shall be issued by the circuit clerk of the county in which the applicant for a permit resides in this state, if the sheriff be satisfied that the person applying for the same is of good moral character and of lawful age, and that the granting of the same will not endanger the public safety. The permit shall recite the date of the issuance thereof and that the same is invalid after thirty days after the said date, the name and address of the person to whom granted and of the person from whom such weapon is to be acquired, the nature of the transaction, and a full description of such weapon, and shall be countersigned by the person to whom granted in the presence of the circuit clerk. The circuit clerk shall receive therefor a fee of fifty cents.

"3. If the permit be used, the person receiving the same shall return it to the circuit clerk within thirty days after its expiration, with a notation thereon showing the date and manner of the disposition of such weapon. The circuit clerk shall keep a record of all applications for such permits and his action thereon, and shall preserve all returned permits.

"4. No person shall in any manner transfer, alter or change any such permit or make a false notation thereon or obtain the same upon any



Honorable Bill Burlison

false representation to the circuit clerk granting the same, or use or attempt to use a permit granted to another."

Section 564.640, states:

"No person within this state shall lease, buy or in anywise procure the possession from any person, firm or corporation within or without the state, of any pistol, revolver or other firearm of a size which may be concealed upon the person, that is not stamped as required by section 564.620; and no person shall buy or otherwise acquire the possession of any such article unless he shall have first procured a written permit so to do from the circuit clerk of the county in which such person resides, in the manner as provided in section 564.630."

It will be seen that Section 564.620, provides that a wholesaler or dealer shall not have in his possession for the purpose of sale, nor shall he sell a firearm of a size which may be concealed upon the person, which does not have a trademark or the name of the maker, the model and serial factory number thereof stamped on the metallic portion, and further that they shall keep a full and complete record of the description of the weapon, and the name and address to whom sold and the date sold, and the date of a permit and the name of the circuit clerk granting the permit, and that the records shall be open to inspection at all times.

Section 564.630 provides that no person other than a manufacturer or wholesaler shall directly or indirectly buy or sell, or in any way dispose of any small arms unless they first receive from the person receiving the weapon a permit authorizing the person receiving the weapon the right to acquire it. This permit is to be issued by the circuit clerk of the county in which the applicant for a permit resides in this State, and the sheriff shall be satisfied that the person applying for the permit is of good character, and of lawful age, and the granting of the permit will not endanger the public safety.

A fair interpretation of these requirements indicate that it was the intention of the legislature that the receiver of the small arms must be a resident of this State and one known to the sheriff, who must be satisfied as to the character and reputation of the applicant. Clearly these requirements could not be fulfilled if the applicant were a resident of a foreign State.

Honorable Bill Burlison

Further, Section 564.640 provides that no person within this State shall buy or procure a small firearm that is not stamped as required by Section 564.620. Here again it is indicated that the legislature restricted the possession of such a weapon within this State and the statute further requires that no person shall either buy or possess an unmarked weapon unless he procure a written permit from the circuit clerk in the county wherein he resides, in the manner provided in Section 564.630. This is another indication that the person procuring the weapon or possessing the weapon must be a resident of this State.

This State does not prohibit a dealer or manufacturer, located in this State, from shipping concealable weapons into other States or foreign countries.

Section 564.650 reads:

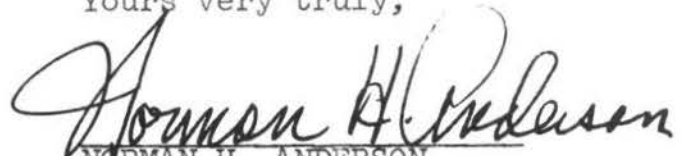
"Nothing contained in sections 564.620 to 564.660 shall be considered or construed as forbidding or making it unlawful for a dealer in or manufacturer of pistols, revolvers or other firearms of a size which may be concealed upon the person, located in this state, to ship into other states or foreign countries, any such articles whether stamped or not so stamped."

#### CONCLUSION

Therefore, it is the opinion of this office that a non-resident of the State of Missouri may not obtain a permit to acquire within the State, firearms of a size which may be concealed upon the person.

The foregoing opinion, which I hereby approve, was prepared by my assistant O. Hampton Stevens.

Yours very truly,

  
NORMAN H. ANDERSON  
Attorney General

COURTS:  
MOTOR VEHICLES:  
HARDSHIP DRIVING PRIVILEGES:  
ST. LOUIS COURT OF CRIMINAL CORRECTION:

The St. Louis Court of  
Criminal Correction has  
concurrent jurisdiction  
with the Circuit Courts  
of the City of St. Louis

to hear applications and to grant hardship driving privileges under  
the terms and conditions specified in Section 302.309-3, RSMo.  
Supp. 1965.

April 6, 1966

OPINION NO. 263

Honorable William H. Knox  
Assistant Prosecuting Attorney  
of City of St. Louis  
Municipal Courts Building  
14th and Market Streets  
St. Louis, Missouri



Dear Mr. Knox:

This is in answer to your request for an opinion of this  
office as to whether or not the St. Louis Court of Criminal  
Correction has jurisdiction to grant limited driving privileges  
in hardship cases under Section 302.309-3, RSMo. Supp. 1965.

The jurisdiction given the courts to allow hardship driving  
privileges is found in subparagraph 1 of paragraph 3, Section 302.  
309, RSMo. Supp. 1965, which provides:

"3. (1) All circuit courts and magistrate  
courts located in counties which are a part  
of a multi-county judicial circuit shall have  
jurisdiction to hear applications for hard-  
ship driving privileges."

The term "circuit court" is defined in Section 302.010  
(2), RSMo. Supp. 1965, as follows:

"'Circuit Court', each circuit court in  
the state, also the St. Louis court of  
criminal corrections and courts of  
common pleas;"

Honorable William H. Knox


It is clear that Section 302.309-3 (1) when considered in conjunction with Section 302.010 (2) confers jurisdiction on the St. Louis Court of Criminal Correction as well as circuit courts of the City of St. Louis to hear and grant hardship driving privileges if otherwise authorized by law.

CONCLUSION

It is the opinion of this office that the St. Louis Court of Criminal Correction has concurrent jurisdiction with the circuit courts of the City of St. Louis to hear applications and to grant hardship driving privileges under the terms and conditions specified in Section 302.309-3, RSMo. Supp. 1965.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John H. Denman.

Very truly yours,

  
NORMAN H. ANDERSON  
Attorney General

May 12, 1966

OPINION NO. 269  
Stevens  
Answered by letter

Honorable Jack J. Schramm  
Missouri House of Representatives  
7701 Forsyth, Suite 574  
Clayton, Missouri 63105



Dear Representative Schramm:

Your letter of April 8, 1966, requesting an opinion from this office is as follows:

"I am a member of the House Workmen's Compensation Committee and am considering introducing some legislation in this area. Specifically, I am presently studying the question of whether Missouri's second injury fund, under the Workmen's Compensation Law, applies to the epileptic.

"On page 73 of Barrow & Fabing's 'Epilepsy and the Law,' (\*) Missouri is cited, in a grouping of thirty-four states, for the proposition that "the combined effect of the first and second injuries must meet the test of total and permanent disability, and, therefore, persons having latent impairments who sustain injury rendering them partially and permanently disabled would not be covered by the second injury fund.

"However, from my reading of the statute, that conclusion appears inaccurate since Section 287.200 (SIC 287.220), RSMo provides for the application of the second injury fund to permanent partial as well as to permanent total disability. Moreover, in Missouri, it is not necessary that the prior injury be due to accident or that it had been compensable.

"On the other hand, Missouri's statute is not explicit in its definitions; there is no precise language that settles the question of the includability of a latent

Honorable Jack J. Schramm

impairment such as epilepsy in the provisions relating to the second injury fund. Qualifying amendments to the Workmen's Compensation Law might very well be appropriate, but I am interested in learning your opinion of the state of the law as it presently stands.

"My question, stated once again, is: DOES THE SECOND INJURY FUND OF THE MISSOURI WORKMEN'S COMPENSATION LAW APPLY TO THE EPILEPTIC?"

"(\*) Roscoe L. Barrow and Howard D. Fabing, M.D., Epilepsy and the Law. For information concerning this book, address: Paul B. Hoeber, Inc., Medical Book Department of Harper and Bros., 49 East 33rd Street, New York 16, New York."

Because by law the Attorney General is charged with representing the Second Injury Fund we think it inappropriate to try to write an opinion on your inquiry and instead state the Attorney General's position respecting the ideas raised by your inquiry.

You quote from Barrow & Fabing's "Epilepsy and the Law". We are not familiar with this work and hence we are unable to comment on the statement therein.

Your letter asks if the Second Injury Fund Law applies to the epileptic. It is impossible to give a yes or no answer to that question. Each case must, of necessity, be answered according to the facts in that particular case.

It should be kept in mind that the fundamental purpose of a Second Injury Fund is to permit the employment of the physically handicapped, without hardship on the employee or the employer.

Second Injury legislation varies greatly in the various states. Many states require that the prior disability be from the loss, or loss of use, of an eye, leg, arm, foot or hand, and many also require that the last injury be from the loss, or loss of use, of another such member or organ.

The State of California formerly had a Second Injury Law similar to the one in Missouri, which covered any permanent partial disability without requiring a minimum extent of disability.



Honorable Jack J. Schramm

Like our law, there was no attempt to restrict claims to those who were really employment handicaps. With this law in effect in California claims against the Fund pyramided rapidly and many referees awarded payment in cases where the pre-existing condition, while perhaps contributing to the employee's present disability, was not actually disabling before his last injury. The Attorney General of the State of California described these claims as "cases where the pre-existing condition was merely a latent, asymptomatic and a non-disabling pathology." The failure of the California law to set a minimum extent of disability for the last injury resulted in an even greater problem, since it permitted claimants afflicted with major, but latent pre-existing disabilities to become eligible for lifetime pensions from the Second Injury Fund, if they sustained a second injury of a minor nature. The same situation now exists in Missouri.

California has since amended its law, which is titled The Subsequent Injury Law, so that it is required that the previous disability must be equal to 70 percent or more of the body, or the previous disability affected a hand, an arm, a foot, a leg, or an eye, and the disability resulting from the last accident affects the opposite and corresponding member, or the permanent disability from the last accident considered alone and without regard to the age of the employee is equal to 40 percent or more of the total disability.

California has held that the sections of their Subsequent Injury Act are "not to be construed in such a manner so as to make them a state health plan or welfare organ."; Subsequent Injury Fund vs. Industrial Accident Commission, 217 C.A. 2d 322; and also that the Act "was not intended to apply to asymptomatic disease processes which were unknown to both employee and employer and which in no-wise interfered with the employee's ability to work." State vs. Industrial Accident Commission, 288 P. 2d 31.

It is our position that it was not the intention of the Legislature to make the Fund an old age pension program, or a state welfare organ.

In Section 287.067, which defines occupational disease, the statute provides, "Ordinary diseases of life to which the general public is exposed outside of the employment shall not be compensable \* \* \*."

Honorable Jack J. Schramm

It is true that Section 287.220, in defining a Second Injury case, provides, in respect to the first disability that the disability may be one "whether from compensable injury or otherwise." It is our position that a latent heart condition, arthritis, diabetes, arteriosclerosis, et cetera, that has not disabled the claimant, does not present a situation upon which a Second Injury case can be based.

In the last year or two, a large number of cases have been filed against the Fund, bottomed upon a nondisabling diseased condition. Particularly is this true where the claimant is sixty years or older, and the previous disability is the result of general debility, due to the passage of years. We recently were called upon to defend a case for total disability against the Fund where the claimant was eighty-two years old. We have continued a vigorous opposition to these cases, principally because we do not believe that the allowance of large sums against the Fund and the attendant life pensions are in keeping with the purpose for which the Fund is created. Our situation is rapidly approaching the situation that occurred in California, some ten or fifteen years ago.

Our defense against this type of case, when the previous disability is a disease condition and not disabling is three-fold. First, as stated, we maintain the Act was never meant to cover situations of this type. Second, we maintain that no previous disability existed as required under the terms of the Act, and third, that the last injury aggravated a nondisabling condition, and hence is the responsibility of the last employer. The case of Garrison vs. Campbell, Mo., 297 S.W. 2d 22, 25, so holds:

"Having found it apparent that the purpose of Section 287.220 (1) is to prevent duplication of compensation for disabilities, our appellate courts have declared that compensation for the last injury should be limited to the extent that it enhances or adds to disability already existing. But, it is equally clear and well-settled, as a necessary corollary, that the provisions of Section 287.220 (1) may be invoked only in those cases where disability exists at the time of the last injury, and that this statute does not apply where a previously-injured employee has recovered completely prior to such last injury. Burgstrand v. Crowe Coal Co., 333 Mo.43, 62 S.W. 2d 406, 408-409 (5-7);

Honorable Jack J. Schramm

Komosa v. Monsanto Chemical Company, Mo. App., 287 S.W. 2d 374, 377 (5); Fuytinck v. Burton W. Duenke Building Company, Mo. App., 280 S.W. 2d 449, 455-456. So whether, at the time of the 1954 accident, claimant had any pre-existing disability became the determinative issue in the instant case."

In Gregg vs. St. Louis Independent Packing Company, Mo. 271 S.W. 2d 223, 225, the Court said:

"There is but one point raised in this appeal. It is contended that the claimant failed to prove any causal connection between her fall and the disability that she now has.

"This court held in Harder v. Thrift Construction Co., Mo. App., 53 S.W. 2d 34, loc. cit. 37:

[1] 'Generally speaking, the rule is that the act contemplates latent or dormant ailments; that the existence of a disease which does not impair the employee's ability to work will not prevent a recovery if the accidental injury accelerates or aggravates such disease to a degree of disability or of death; and that an actual aggravation of an existing infirmity caused by accident arising out of and in the course of the employment, is compensable, even though the particular accident would have produced no such result in the case of a normal and healthy individual.'

"In DeLille v. Holton-Seelye Co., 334 Mo. 464, 66 S.W. 2d 834, our Supreme Court quoted and approved the above portion of our opinion in the Harder case, and again in Wills v. Berberich's Delivery Co., 339 Mo. 856, 98 S.W. 2d 569, the same statement was held to set forth the established rule. Cheek v. Durasteel Co., Mo. App., 209 S.W. 2d 548; Christ v. St. Louis Malleable Casting Co., Mo. App., 213 S.W. 2d 636, 641.

Honorable Jack J. Schramm

"The point is thus resolved to the question of whether or not there was proof that a pre-existing ailment which did not disable claimant was aggravated by her fall to such a degree that she was thereafter disabled because of it."

In fact, claimants have contended, successfully, that where the employee's pre-existing condition of hypertension, and arteriosclerosis or other diseases, was aggravated by the last accident, they may recover against the employer and make no claim that the case is a Second Injury case. *Gennari vs. Norwood Hills Corporation, Mo., 322 S.W. 2d 713, 722, 723:*

"\* \* \* The claimants correctly contend that the existence of a disease or disorder which does not impair the employee's ability to work will not prevent a recovery under the compensation act if an accidental injury aggravates such disease to a degree of disability or accelerates death even though the particular accident would not have produced such a result in the case of a person not so afflicted. *Conley v. Meyers, Mo., 304 S.W. 2d 9, 13 [6]; Garrison v. Campbell '66' Express Inc., Mo. App., 297 S.W. 2d 22, 29 [6]; Cheek v. Durasteel Co., Mo. App., 209 S.W. 2d 548, 555 [5].*"

It has also been held in this state that if the employee had a congenital condition that was undiscovered, an aggravation of such condition by the last accident is the responsibility of the employer. And here again, there was no attempt to make a claim against the Fund:

In the case of *Lofton v. Armour & Company, Mo. 311 S.W. 2d 350*, the Court states:

"\* \* \* If the employee had a congenital condition in the back, which had not theretofore impaired his health or working ability, but that the accident aggravated such condition, then he would be entitled to compensation for such impairment. *Hammett v. Nooter Corporation, Mo. App., 264 S.W. 2d 915.*"

To revert to your question, Does the Second Injury Fund apply to epileptics? Your question is too broad to be answered specifically. The facts in each case must be studied as applying to the situation involved.

Honorable Jack J. Schramm

We doubt that the mere fact that the claimant is an epileptic, would in and of itself, be a sufficient "disabling condition" upon which to base a Second Injury Case. It is our understanding that most types of epilepsy, like diabetes, may be controlled by medication, and therefore are not disabling. If the epilepsy was latent and the claimant was not disabled by reason thereof, and if the last injury aggravated his condition, or if the last accident caused the epilepsy, he should be able to recover from the last employer.

We know of no cases in this state, or for that matter, elsewhere, where epilepsy was the basis of a Second Injury claim. We cannot categorically state that epilepsy could not be the basis for a Second Injury case. We can only add that we would defend the matter if the facts warranted, on the principles as set forth herein.

The foregoing statement which I hereby approve was prepared by my assistant, O. Hampton Stevens.

Yours very truly,

NORMAN H. ANDERSON  
Attorney General

OHS/fb

WORKMEN'S COMPENSATION LAW:  
WORKMEN'S COMPENSATION,  
DIVISION OF:  
INDUSTRIAL COMMISSION:  
RECORDS:

Section 287.380 RSMo. Cum. Supp. permits the Division of Workmen's Compensation and the Industrial Commission to disclose records in their discretion to persons other than parties of the compensation proceedings.

OPINION NO. 270

August 16, 1966

Honorable Richard J. Rabbitt  
Representative 8th District  
4366 Maryland Avenue  
St. Louis, Missouri



Dear Representative Rabbitt:

Your letter of April 8, 1966, requesting an opinion is as follows:

"I refer to Chapter 287.380, Subsection 3, of the Missouri Workmen's Compensation Law, and my question is:

In this subsection does the restriction, placed on the disclosure to 'persons other than the parties to compensation proceedings and their attorneys. . . ' (except by order of the Commission, etc.), limit the release of the information in a Division of Workmen's Compensation file, without the consent of the injured employee, to parties interested in the particular injury for which the particular file is made, or does it allow anyone who is interested in any proceeding, Compensation or otherwise, to have access to these files without a prior order of the Commission?"

Section 287.380 RSMo. Cum. Supp. 1965, requires employers to make certain reports to the Division of Workmen's Compensation and provides for the assembly of certain other information in the file of an employee who has an accident resulting in personal injury. Paragraph 3 of this section then provides:

"3. No information obtained under the provisions of this section shall be disclosed to persons other than the parties to compensation proceedings and their attorneys,



Honorable Richard J. Rabbitt

except by order of the division or the commission, or at a hearing of compensation proceeding, but such information may be used by the division of the commission for statistical purposes."

It is to be noted that this paragraph provides that no information obtained under the provisions of this section shall be disclosed other than to the parties to the compensation proceedings and their attorneys except by order of the Division or the Commission. It is at once apparent that there may be facts and information contained in the file that are not obtained under the provisions of this section.

This section places no restriction on parties or their attorneys using the information in a particular case in another compensation proceeding. It then provides that the information contained in the file which was obtained under the provisions of this section shall be disclosed only upon the "order of the division or the commission." All of these files are kept under the supervision of the Director of the Division of Workmen's Compensation.

We are informed that the present administrative practice of the Division is that when a request for information comes into the office it is referred to the Director. If the Director is satisfied that the inquirer has a legitimate interest in obtaining the information then the Director in his discretion permits the requested information in the files to be disclosed. The Director and his counsel have taken the administrative position that this Section authorizes the Director, in his discretion, to permit persons other than the parties or their attorneys to the compensation proceedings, opportunity to examine the file. Written orders of the Director for such permission have not been deemed necessary.

We agree that the administrative interpretation is supported by the law with the sole exception that the statute requires a written order of the Division or the Commission.

Commissions, Boards, and Administrative bodies in general should keep written records of all matters coming to their attention. 73 C.J.S., Page 316, states the rule:

Honorable Richard J. Rabbitt

"In the interests of orderly procedure and certainty as to the proceedings of administrative bodies and action taken, such bodies should, as far as practical, have written records or minutes of all proceedings before them of action taken by them. Such bodies ordinarily speak only through their records."

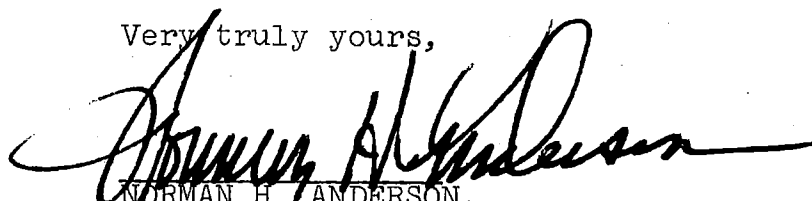
The language of this statute in our view vests in the Division or the Commission the discretion to determine whether information contained in the files and obtained under the provisions of this section should be disclosed to persons other than parties to the proceedings and their attorneys. The only limitation that is apparent to this broad authority would be an abuse of that discretion. Whether or not this discretion has been abused would be dependent upon all the facts of a particular case.

#### CONCLUSION

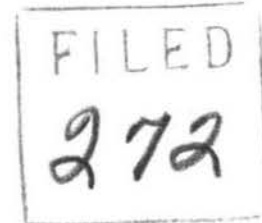
Section 287.380 RSMo. Cum. Supp. 1965, permits the Division of Workmen's Compensation and the Industrial Commission to disclose records not obtained under the provisions of this section and to disclose information obtained under the provisions of this section in their discretion to persons other than parties to the compensation proceedings and their attorneys upon written order by the Division or the Commission provided they do not abuse that discretion.

The foregoing opinion which I hereby approve was prepared by my assistant O. Hampton Stevens.

Very truly yours,

  
NORMAN H. ANDERSON  
Attorney General

April 20, 1966



OPINION NO. 272  
Answered by Letter-Denman

Honorable Robert Devoy  
Representative for Linn Co.  
House Post Office  
Jefferson City, Missouri

Dear Representative Devoy:

This letter is in answer to your question as to whether the sale of certain chemicals, atrozine, aldrin, and treflin, to farmers for use at the time of and prior to planting their crops is exempt from the imposition of sales tax under Section 144.030, RSMo. Supp. 1965.

Enclosed herewith is a copy of an opinion of this office, No. 123, rendered on June 4, 1964, to the Honorable Noel G. Hughes, State Representative from Dade County. In this opinion we stated that the sale of aldrain (aldrin) granules is not exempt from sales tax inasmuch as aldrain is not a "fertilizer" nor is it "spray materials which are to be used for spraying growing crops."

We were informed by the Department of Agriculture that atrozine and treflin are herbicides (aldrain is an insecticide), and none of these three chemicals are fertilizers. See Section 266.291 (3), RSMo. Although treflin and atrozine may be used as a spray, like aldrain both generally are used in granule form. However, in either form, each of these chemicals is administered to the soil at or prior to the time of seeding crops that will ultimately be sold at retail.

For the reasons stated herein and in the enclosed opinion, it is our opinion that atrozine and treflin like aldrain, if

Honorable Robert Devoy

administered to the soil at or prior to the time the crop is planted (and, therefore not yet growing) are not exempt from sales tax under Section 144.030, RSMo. Supp. 1965.

Very truly yours,

NORMAN H. ANDERSON  
Attorney General

JHD:cw

Enclosure (opinion):

No. 123, to Hughes, 6/4/64.

April 27, 1966



Honorable David Thomas  
Prosecuting Attorney  
Carroll County  
Carrollton, Missouri

Dear Mr. Thomas:

This is in response to your inquiry concerning whether or not unused State Hospital lands at Carrollton, Missouri, may be leased to a private individual without legislative authority.

We understand that you are referring to lands presently held and occupied, although not used in the normal sense, by the Carrollton State School and Hospital. The Carrollton School and Hospital is established pursuant to Section 202.591, RSMo 1959, and is combined with the Marshall State School and Hospital and the Higginsville State School and Hospital under one superintendent. This complex is under the administrative control of the Division of Mental Diseases and hence within the Department of Public Health and Welfare by virtue of Section 191.010, RSMo 1959.

Title to the land is, under Section 191.120, RSMo 1959, vested in the incumbent Director of the Department of Public Health and Welfare.

We are enclosing an opinion dated October 9, 1950, to Samuel Marsh the then incumbent Director of the Department of Public Health and Welfare which is relative to the question.

We held therein that the legislature would have to enact legislation giving the Director specific authority to enter into such a lease.

Our present review of the law reveals that there is no general statutory authority to make such a conveyance and accordingly it is our opinion that such a lease cannot be entered into in the absence of specific legislative authority.

Yours very truly,

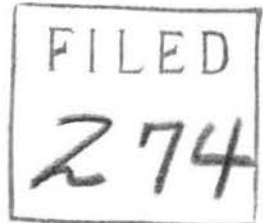
NORMAN H. ANDERSON  
Attorney General

JCK:df  
Enclosure: Opinion to Samuel Marsh,  
October 9, 1950.

June 27, 1966

OPINION NO. 274  
Answered By Letter (Ashby)

Honorable Ray V. Jeffrey, Industrial Director  
Division of Commerce and Industrial Development  
State of Missouri  
8th Floor of Jefferson Building  
Jefferson City, Missouri 65101



Dear Mr. Jeffrey:

This letter is written in response to your two questions, recently submitted by letter, wherein you asked if the proposed House Bill No. 24 of the 73rd General Assembly was sufficient to exempt the leasehold interest of property constructed by a municipality using funds raised by industrial bonds and whether it is permissible to make mandatory payments as rent in lieu of all property taxes.

Inasmuch as the question of taxability of leasehold interests is presently pending on appeal before the Supreme Court of Missouri and an opinion is expected to be handed down in the near future, we believe it advisable to defer answering your question at this time. As soon as the court's opinion is announced, we will send you a copy for your information.

Subject to the ruling of the Supreme Court as noted above, the amount of rent paid as the consideration for leasing the premises by the city as lessor to the private enterprise as lessee is a matter of contract. There is imposed by law only a minimum to the effect that "the rental shall be sufficient to meet the interest and sinking fund requirements on the bonds" as required by Section 71.847, RSMo Supp. 1965.

We trust this will constitute a sufficient answer to your questions.

Yours very truly,

NORMAN H. ANDERSON  
Attorney General



September 28, 1967

OPINION NO. 315  
Answer by Letter-Denman

Honorable Thomas R. Gilmore  
Assistant Prosecuting Attorney  
Scott County  
Sikeston, Missouri 63801



Dear Mr. Gilmore:

This is in answer to your question as to the advisability of proceeding with a prosecution against a person charged with operating a motor vehicle licensed as a "local commercial motor vehicle" out of the geographical limits authorized by Section 301.010(10), RSMo.

This subsection defines a local commercial vehicle as follows:

"a commercial motor vehicle whose operations are confined solely to a municipality and that area extending not more than twenty-five miles therefrom; or a commercial motor vehicle whose property carrying operations are confined solely to the transportation of property owned by any person who is the owner or operator of such vehicle, to or from a farm owned by such person or under his control by virtue of a landlord and tenant lease; provided that any such property transported to any such farm is for use in the operation of such farm;"

The facts giving rise to the charge, you state to be as follows:

"The defendant owns several trucks and was charged for operating one of his trucks outside the geographical limits for which it was licensed. The truck had a 'local' Missouri truck license. The defendant had an arrangement with a farmer near Perryville, Missouri by which the defendant would provide all of the labor and operating

expenses necessary to cut and bale hay on this man's farm. The defendant was also to truck the hay wherever necessary in order to market it. The defendant and the farmer were to split all the proceeds on a 50-50 basis. The defendant was under the impression that since he was involved in a joint farming operation with this farmer, he was entitled to transport this hay under his local license by virtue of the definition in Sec. 301.010(10). Reading this part of the Statute literally, it would appear the defendant is not covered by the strict language which reads 'to or from a farm owned by such person or under his control by virtue of a landlord and tenant lease'."

We have no previous rulings on your question and find no cases directly in point. Since this question is one which is now pending before the court, it is the policy of this office in such circumstances not to issue an official opinion on the subject. However, it is our position, based upon the facts you have given, that you should proceed with prosecution on the charge now pending.

Under these facts it does not appear that the vehicle in question was being operated in accordance with the definition of a local commercial vehicle. The farm is not owned by the owner of the truck, and an arrangement whereby the truck owner agreed to cut and bale the farmer's hay and transport it to wherever necessary in order to market it in payment for 50% of the proceeds does not constitute a landlord and tenant relationship. There is also some doubt as to whether the arrangement would vest ownership of the hay in the truck owner sufficient to convert the hay into "property owned" by the owner of the vehicle as required by Section 301.010(10).

The registration fee for "local" commercial vehicles is substantially less than that for regular commercial vehicles. Section 301.060, RSMo Supp. 1965. This partial exemption from payment of registration fees may be compared to exemptions from taxes given religious, charitable and educational institutions under certain specified conditions. It is well settled in such cases, that the provisions of the exempting statutes must be strictly yet reasonably construed, and the burden is on the taxpayer to show that he is entitled to the exemption claimed. In re First National Safe Deposit Co., Mo.Banc 173 S.W.2d 403; Bethesda Naval Hospital v. State Tax Commission, Mo.Sup., 381 S.W.2d 772; State ex rel St. Louis Y.M.C.A. v. Gehner, Mo.Sup., 11 S.W.2d 304.

The statutory definition of a "local commercial vehicle" is "confined solely" to vehicles operated in conformance with the provisions therein, and construing these provisions strictly as we believe

Honorable Thomas R. Gilmore

they should be, in our opinion the state should take the position that the truck in question was not being operated within its authority as a "local commercial vehicle", and you should proceed with the prosecution on this charge.

Very truly yours,

NORMAN H. ANDERSON  
Attorney General

JHD:maw

Opinion No. 276  
Answered By Letter  
(Mansur)

April 29, 1966



Honorable Paul E. Williams  
State Representative  
Pike County  
Room 303, Capitol Building  
Jefferson City, Missouri

Dear Representative Williams:

Recently you requested an opinion from this office as to whether a resident of the State of New Mexico, otherwise qualified, could be appointed as prosecuting attorney of a third class county.

We are enclosing herewith an opinion issued by this department on May 24, 1965, to Honorable Warren E. Hearnes, Governor of the State of Missouri, in which the residency requirements of public officials under Section 8 of Article VII of the Constitution of Missouri 1945, is discussed at length. Section 56.010, RSMo., relates to the qualification of prosecuting attorneys to be elected.

It is our opinion, that under the above constitutional provision a person must be a resident of the State of Missouri, one year next preceding his election or appointment to the office of prosecuting attorney.

Very truly yours,

NORMAN H. ANDERSON  
Attorney General

Enclosure:  
Opinion No. 139(1965)

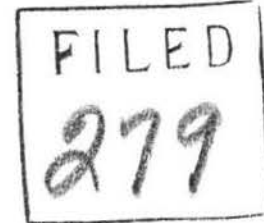
NEPOTISM:  
PROBATE JUDGE:  
PROBATE COURT:  
INHERITANCE TAX APPRAISER:

The Nepotism provision of Article VII, Section 6, of the Constitution is not violated by the appointment by the Probate Judge of his father as Inheritance Tax Appraiser.

July 27, 1966

OPINION NO. 279

Honorable Gerald Kiser  
Prosecuting Attorney  
Clay County  
Liberty, Missouri



Dear Mr. Kiser:

This is in response to your request for an opinion dated April 13, 1966, as follows:

"Is a Probate Judge of a county of the second class, namely Clay County, Missouri, in violation of Article 7, Paragraph 6, of the Missouri Constitution of 1945, being the nepotism law, when he appoints as an inheritance tax appraiser his natural father and allows a fee for such services of his father out of the funds of the estate being appraised for inheritance tax purposes?"

This question involves an interpretation of the nepotism provision of the Missouri Constitution, Article VII, Section 6, which provides:

"Any public officer or employee in this state who by virtue of his office or employment names or appoints to public office or employment any relative within the fourth degree, by consanguinity or affinity, shall thereby forfeit his office or employment."

We are unable to find any cases directly in point in which the Courts have construed this provision. In examining the history of this provision we find that in Article XIV, Section 13 of the 1875 Constitution the nepotism provision was somewhat different and provides as follows:

Honorable Gerald Kiser

"Any public officer or employee of this State or of any political subdivision thereof who shall, by virtue of said office or employment, have the right to name or appoint any person to render service to the State or to any political subdivision thereof, and who shall name or appoint to such service any relative within the fourth degree, either by consanguinity or affinity, shall thereby forfeit his or her office or employment."

It is apparent that the language of these two provisions is significantly different. The problem is - Was there a genuine change in meaning of this Constitutional provision. Our examination of the constitutional debates is not enlightening. The Constitutional Convention approved the nepotism provision of the 1875 Constitution and referred it to the committee on drafting and the committee on drafting for reasons not explained in the debates revised the language.

The Constitution, Article VII, Section 6, prohibits with the penalty of forfeiture of office any public officer from appointing a relative within the degrees named to public office or employment. Under the facts stated it is clear that the Probate Judge who made the appointment is a public officer within the meaning of this provision. Likewise the appointment of his father is within the prohibited degree of relationship. The problem is whether an inheritance tax appraiser under the law of Missouri is a "public office or employment".

This then requires a detailed examination of the statutes or position of an inheritance tax appraiser. Section 145.140 to 145.190, inclusive, RSMo 1959, deals with this subject. Particularly Sections 145.150 and 145.160 deal with the relative duties of the Probate Court and the inheritance tax appraiser. They provide as follows:

" 145.150. - 1. The probate court which grants letters testamentary or of administration, either original or ancillary, on the estate of any decedent, has jurisdiction to determine the amount of the tax provided for in this chapter and the person, association, institution or corporation liable therefor, and to determine any question which may arise in connection therewith, and to do any act in relation thereto which is authorized by law to be done by such court in other matters or proceedings coming within its jurisdiction.



Honorable Gerald Kiser

"2. The court shall immediately upon the filing of the inventory and appraisement of the estate of a decedent, examine the same, and if it is apparent, in the opinion of the court, that the estate is not subject to the tax provided for in this law, its finding and opinion shall be entered of record in the court and thereupon the provisions of section 145.210 become inoperative as to the holders of funds or other property thereof, and there shall be no further proceedings relating to such tax, unless upon the application of interested parties the existence of other property or an erroneous appraisement is shown.

3. If it appears that the estate may be subject to such tax, the court shall set a day for the hearing and determining the amount of the tax and shall cause notice thereof to be given in the same time and manner and to the same parties as is herein provided for appraisers, or the court, before determining such matters, may of its own motion, or on the application of any interested person, including the director of revenue, the prosecuting attorney or attorney general, appoint some qualified tax-paying citizen of the county, who is not executor, administrator or beneficially interested in the estate or the attorney for any of the parties, as appraiser to appraise and fix the clear market value of any property, estate or interest therein, or income therefrom which is subject to the payment of a tax under this chapter.

4. Every such appraiser shall make and subscribe, and file with the court appointing him, an oath that he will faithfully and impartially discharge his duties as appraiser and that he will appraise all the property, estate, interest therein or income therefrom involved in the proceeding in which he is appointed at its clear market value and shall forthwith fix a time and place for hearing the evidence and shall file notice thereof with the court appointing him not less than ten days prior to the date fixed and shall also give notice by mail to all interested persons whose address he may have, always including the director of revenue and the prosecuting attorney of the county.

Honorable Gerald Kiser

"5. When proceedings are instituted under sections 473.090, 473.093, 473.097 and 473.103, RSMo, the court may proceed under subsection 3, or it may determine in a summary manner the amount of tax, if any, provided for in this chapter, and the parties liable therefor."

"145.160 - 1. The appraiser shall appraise all property, estate, assets, interest or income at its clear market value and he is hereby authorized to issue subpoenas and compel the attendance before him of witnesses and the production of books, records, documents, papers and all other material evidence, to administer oaths and to take the testimony of all witnesses under oath.

2. He shall make report of his appraisement to the court in writing and shall return the testimony of the witnesses and all other evidence and such other facts in relation thereto as the court may by its order require, and such report shall be made within twenty days after the appointment of such appraiser, unless the court, for good and sufficient cause, by order gives such appraiser further time in which to report; provided, when the estate consists of personal property only, the prosecuting attorney may, with the consent of the director of revenue agree with the parties liable to pay any tax upon the amount of the same, and the court, if it approves such agreement, shall enter judgment accordingly and no appraiser shall be appointed."

The St. Louis Court of Appeals in *Trieseler v. Ratican*, 173 S.W. 2d 595, considered the function of an inheritance tax appraiser as follows, l.c. 598:

"The whole question in this case resolves itself into one of whether an appraiser appointed under the act is entitled to receive such per diem compensation for time spent, not in actually placing a valuation upon the estate for the purpose of assessing the inheritance tax, but in attempting to discover assets which, if found and accounted for, would be subject to a tax under the provisions of the act.

Honorable Gerald Kiser

Having due regard for the limited function which the appraiser is designed to serve, we cannot escape the conclusion that the answer must be in the negative.

The law is explicit upon the question of what the appraiser's duties shall be and of the character of service for which he shall be entitled to receive compensation.

[2,3] As his official title implies, his function is to appraise the estate at its clear market value, in the accomplishment of which he is authorized to hear evidence relating to such question, and at the conclusion of which he is required to make a report of his appraisement to the court. To be sure, the identification of the property as having belonged to the decedent at the time of his death, or as having been transferred by him in contemplation of death, must necessarily precede its valuation for the purpose of determining the amount of the inheritance tax, but as our act is written, all such matters are judicial questions for the court, and are to be shown either by the inventory filed by the administrator, or else upon the application of an interested party representing the state, which has the burden of showing that the particular estate is subject to inheritance tax. In re Franz' Estate, 344 Mo. 510, 127 S.W. 2d 401. The appointment of an appraiser in no sense supplants the application of the ordinary proceedings for the discovery of assets, nor does the appraiser, by virtue of his appointment, become a representative of the state so as to have an interest and occupy a position adverse to that of the heirs and transferees. (Emphasis ours)

We then turn to a consideration of the law as to the meaning of "public office or employment". The Supreme Court of Missouri has on several occasions discussed the rules and meaning of the term "public office". In State ex rel Walker v. Bus, 135 Mo. 325, 36 S.W. 636, 637, the Court said:

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"2. A public office is defined to be 'the right, authority, and duty, created and conferred by law, by which, for a given period, either fixed by law or enduring at the pleasure of the creating power, an individual is invested with some portion of the sovereign functions of the government, to be exercised by him for the benefit of the public.' Mechem, Pub. Off. 1. The individual who is invested with the authority, and is required to perform the duties, is a public officer. The courts have undertaken to give definitions in many cases; and while these have been controlled more or less by laws of the particular jurisdictions, and the powers conferred and duties enjoined thereunder, still all agree substantially that if an officer receives his authority from the law, and discharges some of the functions of government, he will be a public officer. State v. Valle, 41 Mo. 30; People v. Langdon, 40 Mich. 673; Rowland v. Mayor, etc., 83 N.Y. 376; State v. May, 106 Mo. 488, 17 S.W. 660. Deputy sheriffs are appointed by the sheriff, subject to the approval of the judge of the circuit courts. They are required to take the oath of office, which is to be indorsed upon the appointment, and filed in the office of the clerk of the circuit court. After appointment and qualification, they 'shall possess all the powers and may perform any of the duties prescribed by law to be performed by the sheriff.' Rev. St. 1889 §§ 8181, 8182. The right, authority, and duty are thus created by statute. He is invested with some portions of the sovereign functions of the government, to be exercised for the benefit of the public, and is, consequently, a 'public officer,' within any definition given by the courts or text writers. It can make no difference that the appointment is made by the sheriff, or that it is in the nature of an employment, or that the compensation may be fixed by contract. The power of appointment comes from the state; the authority is derived from the law; and the duties are exercised for the benefit of the public. Chief Justice Marshall defines a public office to be 'a public charge or employment.' U. S. v. Maurice, 2 Brock,

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96 Fed. Cas. No. 15,747. Whether a public employment constitutes the employe a public officer depends upon the source of the powers and the character of the duties. The constitution (article 14, §6) requires 'all officers, both civil and military, under the authority of this state,' before entering on the duties of their office, to take and subscribe a prescribed oath. The statute requires a deputy sheriff to take 'the oath of office,' and his powers and duties are made equal to those of the sheriff himself. The deputy sheriff is certainly a 'public officer', under the laws of this state, and his power and authority are co-extensive with that of sheriff. State v. Dierberger, 90 Mo. 369, 2 S.W. 286."

Again in the Supreme Court En Banc in State ex rel Pickett v. Truman, 64 S.W. 2d 105, in a divided decision held that a delinquent tax attorney was not a public officer, considered the criteria for determining whether a particular position is a public office, 1.c. 106:

"[1] Numerous criteria, such as (1) the giving of a bond for faithful performance of the service required, (2) definite duties imposed by law involving the exercise of some portion of the sovereign power, (3) continuing and permanent nature of the duties enjoined, and (4) right of successor to the powers, duties, and emoluments, have been resorted to in determining whether a person is an officer, although no single one is in every case conclusive. 46 C.J. p. 928, § 19, n. 1; 53 A.L.R. p. 595. It is the duty of his office and the nature of the duty that makes one an officer and not the extent of the authority (Mechem on Public Officers, p. 7 §9; Throop on Public Officers, pp. 2,3, §2), although designation by law has some significance. 46 C.J. p. 931, §24; State ex rel v. Gray, 91 Mo. App. 438, 445; State ex rel. Cannon v. May, 106 Mo. 488, 505, 17 S.W. 660; State ex rel. v. Shannon, 133 Mo. 139, 164, 33 S.W. 1137; Gracey v. St. Louis, 213 Mo. 384, 393, 394, 111 S.W. 1159.

[2] In Mechem on Public Officers, pp. 1 and 2, §1, it is said: 'A public office is the right, authority



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and duty, created and conferred by law, by which for a given period, either fixed by law or enduring at the pleasure of the creating power, an individual is invested with some portion of the sovereign functions of the government, to be exercised by him for the benefit of the public. The individual so invested is a public officer.' We have approved this definition in State ex rel. Walker v. Bus, 135 Mo. 325, 331, 332, 36 S.W. 636, 33 L.R.A. 616, State ex rel. v. Hackmann, 300 Mo. 59, 254 S.W. 53, 55, and Hasting v. Jasper County, 314 Mo. 144, 282 S.W. 700, 701; and it appears to be in harmony with the great weight of authority. \* \* \*

Again the Supreme Court En Banc in State ex inf McKittrick v. Bode, 113 S.W. 2d 805, 806, discussed the definition of the word "public office" or "public officer":

"[1] It is not possible to define the words 'public office or public officer.' The cases are determined from the particular facts, including a consideration of the intention and subject-matter of the enactment of the statute or the adoption of the constitutional provision. In other words, the duties to be performed, the method of performance, end to be attained, depository of the power granted, and the surrounding circumstances must be considered. In determining the question it is not necessary that all criteria be present in all the cases. For instance, tenure, oath, bond, official designation, compensation, and dignity of position may be considered. However, they are not conclusive. It should be noted that the courts and text-writers agree that a delegation of some part of the sovereign power is an important matter to be considered. \* \* \*

The Supreme Court of North Dakota in the case of Baird v. Lefor, 201 N.W. 997, 38 A.L.R. 807, had under consideration the question of whether or not a receiver appointed by the Court was a "civil officer" within the meaning of the provision of the North Dakota Constitution prohibiting a member of the legislative assembly from being appointed or elected to any civil office in that state during the term for which he was elected. The Court



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in considering the question of whether a receiver appointed by the Court was a civil officer within the meaning of that provision said, 1.c. 811:

"We think that a receiver appointed by a court is not the holder of a civil office within the meaning of that term as used in the Constitution. It is true that he is an officer of the court, See Hoffman v. Bank of Minot, 4 N.D. 473, 61 N. W. 1031; State ex rel Miller v. People's State Bank, 22 N.D. 583, 135 N.W. 196; Platt v. Beach, 2 Ben. 303, 1 Thomp. Nat. Bank Cas. 182, Fed. Case. No. 11,215; Beach, Receivers § 29; 34 Cyc. p. 236, and cases cited. But he is not a public officer. See Platt v. Beach, 2 Ben. 303, 1 Thomp. Nat. Bank Cas. 182, Fed. Cas. No. 11,215; Cohnen v. Sweeney, 105 Mich. 643, 63 N.W. 641; Citizens' Commercial & Sav. Bank v. Circuit Judge, 110 Mich. 633, 68 N. W. 649; High, Receivers, § 2; 22 R.C.L. 398.

And Blackstone says: An office is 'a right to exercise a public or private employment and to take the fees . . . thereunto belonging . . . whether public as those of magistrates, or private, as of bailiffs, receivers, and the like.' 2 Bl. Com. §36.

A receiver is an officer of the court in the sense that he is the agent or representative of the court in holding any property that the court may acquire jurisdiction over, and in disposing of the same -- the hand and arm of the court, through whom the court acts. He is appointed by, and is removable at the pleasure of, the court. He is responsible to no one but the court. His compensation is fixed by the court. He can sue or be sued, but only under the direction and with the permission of the court. His authority comes from the court, and in its exercise he has no discretion independent of the court. He exercises none of the powers of civil government. He is no more a civil officer than is an attorney at law, or a guardian, or a referee, or a jury commissioner, or a jurymen, or any 'officer' appointed by the court to enable it to properly function as a court."

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It is at once apparent from an examination of the statutes applicable to inheritance tax appraisals that the duty is placed upon the Probate Judge to make the appraisal. The Probate Judge may, if he desires, seek the advice of an appraiser which he appoints and which makes investigation and recommendations to the Judge. The Judge has the right to either accept or reject the recommendations of the appraiser. We think, therefore, that while some of the criteria for public officer is present in the position of inheritance tax appraiser, not all are present and particularly the element of the exercise of sovereign power is lacking. We, therefore, believe that an inheritance tax appraiser is not a public officer within the meaning of the nepotism provision of the Constitution.

We then turn to the term of "employment". Certainly the use of the word "employment" can not be applied to private employment. The nepotism provision of the Constitution certainly does not prohibit the Probate Judge from employing his relative as a laborer on his farm, or as a carpenter on his private residence, hence we read this provision as though the word "public" modifies the word "employment". We then must seek the meaning of "public employment" as applied to the facts in this case.

We find a good many authorities that discuss the distinction between "public office" and "public employment". See Words and Phrases, Volume 35, Page 155, 156, et seq. However, the authorities which make the distinction between public employment and private employment are much more difficult to find. Yet the problem with which we are concerned involves this precise distinction. Black's Law Dictionary, Fourth Edition, Page 617, defines employ:

"To engage in one's service; to use as an agent or substitute in transacting business; to commission and intrust with the management of one's affairs; and when used in respect to a servant or hired laborer the term is equivalent to hiring which implies a request and a contract for a compensation, and has but this one meaning when used in the ordinary affairs and business of life."

We think that the word employment used in this constitutional provision is used in the context of an employer-employee relationship, or a principal and agent relationship, or a master and servant relationship. The Supreme Court of Ohio in *State ex rel Cooper v. Roth*, 44 N. E. 2d 456, 458, said:

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"[3,4] The crucial question then is whether service in the United States **army** constitutes public employment. \* \* \*

The term 'employment' connotes service or that which engages one's time or attention. It may be with or without compensation. Public employment means employment by some branch of government or body politic as contrasted with private employment. The military forces of the United States are a branch of the United States Government, recognized as such by the Constitution of the United States, and service in this department of government is known and recognized as public service or public employment. The compensation for such service is paid by the government from the national treasury. Private service or private employment could not be so paid or compensated."

There are certainly several factors which must be considered in determining whether a particular work, job or position, is public or private employment. Certainly one of the important factors is the source of the pay received by the employee. Respecting payment, 81 C.J.S. Section 53, Page 973, states:

"Payment of particular persons by the state is a very strong circumstance showing that they are state employees, and it has been held that one becomes a civil servant or employee only when he furnishes his services or labor for compensation directly paid to him by the state."

This statement is in part supported by McDaniel V. Moore, 118 S.W. 2d 272, 276 (Supreme Court of Arkansas) referring to county public welfare directors, "They are paid by the state and this is a very strong circumstance showing they are state employees."

The Supreme Court of Missouri, En Banc, in Rider v. Julian, 282 S. W. 2d 484, was considering whether employees of public utilities which had been seized by the state were state employees so as to impose liability on the state for such employees' torts. Judge Storckman for the Court said, l.c. 493:

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"We are presently interested in determining whether Julian entered into any hiring or contract of employment with the operating personnel of the utility on behalf of the state. State employment, while it must be authorized by law, generally has its basis in contract, express or implied, the same as any other hiring. 67 C.J.S., Officers § 5(4), p. 114, states that '\* \* \*an employment, although it may be created by law, usually arises out of a contract between the government and the employee; \* \* \*

[10, 11] This court has adopted the definitions of master and servant found in §2, Restatement of the Law of Agency; Smith v. Fine, 351 Mo. 1179, 175 S.W. 2d 761, 765; Mattan v. Hoover Co., 350 Mo. 506, 166 S.W. 2d 557, 564. Section 2 of the Restatement defines a master as follows: 'A master is a principal who employs another to perform service in his affairs and who controls or has the right to control the physical conduct of the other in the performance of the service.' A servant is 'a person employed by a master to perform service in his affairs whose physical conduct in the performance of the service is controlled or is subject to the right to control by the master.' The record is devoid of any evidence that Julian controlled or had the right to control the physical conduct of the operating employees of the utility.

[12,13] None of the utility employees were paid by the state. This is a strong factor indicating that they were not state employees. Williams v. Gideon-Anderson Lumber Co., Mo. App. 224 S.W. 51, 53. In 81 C. J. S., States § 53, p. 973, with reference to state employees, it is stated: 'Payment of particular persons by the state is a very strong circumstance showing that they are state employees, and it has been held that one becomes a civil servant or employee only when he furnishes his services or labor for compensation directly paid to him by the state. \* \* \* An independent contractor, working for the state, has been held not "an employee of the state".' Under the evidence, we must hold that there was no contract of employment, either express or implied, between Julian on behalf of the state and the operating personnel of the utility."

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It is clear that the inheritance tax appraiser's fee is to be allowed by the Court and paid out of the estate, Section 145.190 RSMo 1959. No part of the fees or expenses paid to an inheritance tax appraiser is paid from any public funds.

Turning now to other elements to be considered in whether employment is public or private. The 8th Circuit Court of Appeals had under consideration whether attorneys employed by the State Insurance Department were employees of the State or a political subdivision thereof so as to exempt them from the Federal Income Tax in *Lohman v. Commissioner of Internal Revenue*, 133 Fed. 2d 977, 979, said:

"\* \* \*It is not always possible to draw a sharp and definite line of distinction between those who are state employees or officers and those who are not. In final analysis the decision in each case must be made upon its own facts. But, in general, the courts have held one receiving compensation for services to a State or its political subdivisions, not an officer or employee, where no oath of office was taken or required, no bond was given for the faithful discharge of the employment, where the employment was not for a definite or continuous term or for the performance of duties fixed by law, and where the services were not under the direct control of the public agency receiving them, both as to results to be obtained and the method of obtaining them; and also where the party claiming exemption as an employee was free, while engaged in the service in question, to accept other and concurrent employment. Later cases held that one claiming exemption from federal income taxation on the ground that his income was received as a state employee or officer must show that his services to the State were in the discharge of an essential governmental function and that taxation of the income received for those services imposed a real and not merely a conjectural burden upon the exercise of that function by the State. \* \* \*"

It is apparent that some, but not all, of the criteria are present for an inheritance tax appraiser. An oath but no bond is required of an appraiser while the employment is not for a definite or continuous term. The duties of an appraiser are fixed by law and



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are under the control of the Probate Judge but the results of the appraiser and the methods employed are subject to complete review by the Judge. Almost all appraisers do have their own private business or occupation and hence do conduct other and concurrent employment. The job of inheritance tax appraiser is almost always a side line and not the principal business of the person who accepts the employment.

When we place in the balance those elements which weigh in favor of public employment and those elements which weigh against it, it is manifest that the scales do not clearly and undeniably weigh in favor of public employment. We think it should do so for us to so hold. It appears from examination of Section 145.160, RSMo 1959, that the inheritance tax appraiser shall "make report" of his appraisal to the Court in writing and that the Court has jurisdiction to determine the amount of the tax provided for in this chapter. (Section 145.150). It thus appears that the duty of assessing an inheritance tax is placed directly upon the Court. The appraiser acting merely as an arm of the Court in assembling the facts pertinent to the Court's assessment of the tax acts as an arm of the Court and an advisor to the Court. The Court exercises the prerogative of sovereignty and has the responsibility therefor. His appointee has no authority whatever outside the scope of the statutes and the authority given him by the Court. This authority of the appraiser does not, in our opinion, amount to the exercise of sovereignty or the participation in the exercise thereof.

We think this is similar to the situation of a receiver appointed by the Court and considered in the case of Baird v. Lafor by the Supreme Court of North Dakota, 201 N. W. 997, 38 A.L.R. 807, supra, in which the Court held that the receiver although he is an officer of the Court and is the hand and arm of the Court, is appointed by and removable at the pleasure of the Court, he is responsible only to the Court but he exercises none of the powers of government and he is therefore no more a civil officer than an attorney at law, guardian, referee, or a jury commissioner, jury man or any other officer appointed by the Court to enable it to properly function as a Court.

It is recognized that some of the criteria of public employment is present in the obligations and duties of an inheritance tax appraiser. Certainly a strong argument can be made that such work is public employment. However, we think that we must construe the words "public employment" with reasonable strictness. This for



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the reason that the constitutional provision imposes a severe penalty - forfeiture of office. Penal laws must be construed strictly. Unless the job of inheritance tax appraiser falls clearly and unarguably within the meaning of public employment then we think we do not have the license to so hold. We therefore conclude that an inheritance tax appraiser is not public employment within the meaning of Article VII, Section 6, of the Constitution.

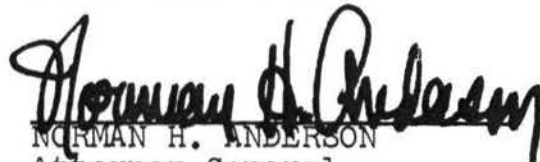
The practice of a Probate Judge of appointing his relatives as inheritance tax appraiser is surely not to be condoned and the practice could certainly be prohibited by the Legislature. We find, however, that the nepotism provision of the Constitution, Article VII, Section 6, does not prohibit the practice.

#### CONCLUSION

The Nepotism Provision, Article VII, Section 6, of the Constitution is not violated by the appointment by the Probate Judge of his father as inheritance tax appraiser because the position of inheritance tax appraiser is not a public office or employment within the meaning of the State Constitutional provision.

The foregoing opinion, which I hereby approve, was prepared by my Assistant J. Gordon Siddens.

Yours very truly,

  
NORMAN H. ANDERSON  
Attorney General

April 20, 1966



Honorable Lem T. Jones, Jr.  
Senator  
State Capitol Building  
Jefferson City, Missouri

Dear Senator Jones:

You have inquired concerning our views respecting the constitutionality and validity of a proposed statute relating to possession of stolen property. We have examined the proposed statute and believe that its constitutionality may be attacked on two possible grounds:

1. That it would destroy the presumption of innocence of a defendant.
2. That it would violate a defendants privilege against self-incrimination.

Of course, this office can not predict with certainty what the Courts might rule respecting this statute, however, it is our view that the proposed statute would probably be held valid and constitutional by the courts. Attached hereto you will find a memorandum prepared by our staff relating to our consideration of the authorities and their probable application to this proposed statute.

Yours very truly,

NORMAN H. ANDERSON  
Attorney General

By  
J. Gordon Siddens  
Assistant Attorney General

Enclosure

April 21, 1966

Honorable Lem T. Jones  
State Senator  
10th District  
700 Waltower Building  
Kansas City, Missouri



Dear Senator Jones:

This is a memorandum which considers your request for an opinion from this office respecting the constitutionality of a proposed new statute to supersede Section 560.270, which would read as follows:

- "1. Any person who with intent to defraud, receives or buys any property from another, knowing the same to have been stolen, or who conceals, withholds or aids in concealing or withholding any property, knowing the same to have been stolen, shall, upon conviction, be punished in the same manner and to the same extent as for the stealing of said property.
- "2. Possession of stolen property within six months from the date of stealing thereof shall be deemed sufficient evidence of knowledge that the property was stolen unless it is shown that the possessor received the property under such circumstances as to cause a reasonable man to believe that the property was not stolen.
- "3. Any person who with intent to defraud receives or buys or who conceals or withholds or aids in concealing or withholding any form or document the contents of which show that upon execution thereof if it is intended to become a draft, check, order, bill of exchange or negotiable instrument, which has been stolen, knowing the same

to have been stolen, shall, upon conviction, be punished by imprisonment by the department of corrections for a term of not more than ten years nor less than one year; or by a fine of not more than one thousand dollars, or by both such fine and confinement."

Subsection 2 of the quoted proposed statute creates a rebuttable presumption of fact, in that it permits a jury in a prosecution for receiving stolen property to infer knowledge on the part of defendant that property is stolen from the fact of this possession of stolen property within six months after it was stolen. The constitutionality of this proposed statute may be attacked on two grounds; First, that it would destroy the presumption of innocence of a defendant, and second, that it would violate a defendant's privilege against self-incrimination. Although, of course, this office cannot predict with certainty the outcome of any future litigation, it is our opinion, based upon the following considerations, that the proposed statute would not be held unconstitutional by the courts of Missouri or by the Federal courts.

A state legislature can create a procedural presumption in favor of the state in a criminal case, without depriving the defendant of the presumption of innocence where there is a rational connection between the fact to be inferred and the fact proved. *Mobile J. & K. C. R. v. Turnipseed*, 219 U.S. 35, 31 S.Ct. 136; *Yee Hem v. U.S.*, 268 U.S. 178, 45 S.Ct. 170; *Morrison v. California*, 291 U.S. 82, 54 S.Ct. 281; *U.S. v. Fleishman*, 339 U.S. 349; *Communist Party of the United States v. United States*, D.C. Cir. 331 F.2d 807, 55 Columbia Law Review 527; *State v. Lively*, Mo., 279 S.W. 976; *State v. Shelby*, Mo., 64 S.W. 2d 269; *City of St. Louis v. Cook*, Mo., 221 S.W.2d 468. The Supreme Court of the United States has consistently held that it is within the power of a state or a federal legislative body to provide for certain presumptions in both civil and criminal law. In *Mobile J. & K.C.R. v. Turnipseed*, supra, the Supreme Court allowed a statutory presumption of negligence in a railroad case to stand on the ground that there was a sufficient rational connection between the fact of the accident and the railroad's negligence to warrant judgment against the railroad unless it offered some proof of non-negligence.

In addition to the idea of a rational connection between the fact proved and the fact inferred, the Supreme Court has announced a second test with respect to the validity of a statutory presumption. In *Morrison v. California*, supra, the Supreme Court found invalid a California alien property law with respect to its placing the burden of proving citizenship (prerequisite to owning property in California) upon the defendant, accused of being an alien property owner. However, Justice Cardozo in

writing the opinion stated that it was proper for the burden of proceeding with the evidence to be shifted in a criminal case under proper circumstances. The court stated, 291 U.S. 82, 1.c. 87:

" . . . For a transfer of the burden, experience must teach that the evidence held to be inculpatory has at least a sinister significance . . . , or if this at times be lacking, there must be in any event a manifest disparity in convenience of proof and opportunity for knowledge, as, for instance, where a general prohibition is applicable to every one who is unable to bring himself within the range of an exception. Greenleaf, Evidence, Vol. 1, §79. The list is not exhaustive. Other instances may have arisen or may develop in the future where the balance of convenience can be redressed without oppression to the defendant through the same procedural expedient. The decisive considerations are too variable, too dependent in last analysis upon a common sense estimate of fairness or of facilities of proof, to be crowded into a formula. One can do no more than adumbrate them; sharper definition must await the specific case as it arises."

In *Yee Hem v. United States*, supra, the constitutionality of a federal statute was upheld that provided that "all opium within the United States shall be presumed to have been imported after 1909 and the burden shall be on defendant to rebut such presumption." This statute squarely put the burden of proceeding with the evidence upon a defendant to show that opium in his possession was imported prior to a year when it became illegal to import opium, if such was his defense. The Supreme Court deemed the statute to be constitutional against the argument that it compelled a defendant to take the stand against himself. The Court's reasoning was that the defendant did not necessarily have to testify; he only had to produce evidence to overcome the presumption. The Court said:

"\* \* \* The statute compels nothing. It does no more than to make possession of the prohibited article prima facie evidence of guilt. It leaves the accused entirely free to testify or not as he chooses. If the accused happens to be the only repository of the facts necessary to negative the presumption arising from his possession, that is a misfortune which the statute under review



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does not create but which is inherent in the case. The same situation might present itself if there were no statutory presumption and a prima facie case of concealment with knowledge of unlawful importation were made by the evidence. The necessity of an explanation by the accused would be quite as compelling in that case as in this; but the constraint upon him to give testimony would arise there, as it arises here, simply from the force of circumstances and not from any form of compulsion forbidden by the Constitution." (268 U.S. 178, 45 S.Ct. 472.)

In *United States v. Fleishman*, supra, a prosecution for contempt of the House Un-American Activities Committee, the question was whether it was necessary for the federal government to negative every defense in an action for citation for contempt for refusal to produce records before a house committee. The Supreme Court ruled in the negative, saying that this type of defense is more particularly within the knowledge of the defendant and to insist upon its proof would cause an unreasonable burden upon the government.

In *Communist Party of the United States v. United States*, supra, the Court of Appeals of the District of Columbia stated with regard to shifting the procedural burden, "But where the pertinent information is much more readily available to the defendant than to the government, the burden may be shifted to him, provided this can be done without subjecting the accused to hardship or oppression. 331 F.2d 807, 1.c. 814."

Thus, the federal constitution is in no way violated when there is a shift of a procedural burden of going forward with the evidence, pursuant to a criminal statute. Justice Cardozo's opinion in *Morrison v. California*, supra, as approved in the *Fleishman* case indicates that, based upon the test of comparative convenience, that is, where the pertinent knowledge is much more readily available to the defendant than to the state, the burden of proceeding may be shifted to the defendant, so that the failure of the defendant to produce this knowledge will create a presumption of fact in favor of the state. The proposed statute under consideration does precisely that. The defendant's knowledge of the stolen character of the property can very seldom be shown by the state; this task becomes almost impossible in view of recent United States Supreme Court decisions which limit interrogation of an accused by police.

This view of the Federal Supreme Court is concurred in by the Supreme Court of this state. In *City of St. Louis v. Cook*, supra, a city ordinance of St. Louis was attacked on constitutional grounds in respect to a provision that the finding of a



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car parked illegally created a prima facie presumption that the owner of the car authorized the illegal parking. Although the case involved a city ordinance, the language of the opinion applies both to ordinances and statutes. The court stated, 221 S.W.2d 468, 1.c. 469, 470:

"[2, 3] Statutes or ordinances providing a rule of evidence, in effect, that a shown fact may support an inference of the ultimate or main fact to be proved are well within the settled power of the legislative body; and such legislative provisions do not violate provisions of the federal or state constitutions. State v. Shelby, 333 Mo. 1036, 64 S.W.2d 269; Yee Hem v. United States, 268 U.S. 178, 45 S.Ct. 470, 69 L.Ed. 904; People v. Kayne, 286 Mich. 571, 282 N.W. 248; Commonwealth v. Kroger, 276 Ky. 20, 122 S.W.2d 1006; People v. Bigman, 38 Cal. App. Supp.2d 773, 100 P.2d 370. 'Legislation providing that proof of one fact shall constitute prima facie evidence of the main fact in issue is but to enact a rule of evidence, and quite within the general power of government. Statutes, national and state, dealing with such methods of proof in both civil and criminal cases, abound, and the decisions upholding them are numerous.' Mobile, J. & K.C.R. Co. v. Turnipseed, 219 U.S. 35, 31 S.Ct. 136, 137, 55 L.Ed. 78, 32 L.R.A., N.S., 226, Ann.Cas. 1912A, 463. Giving a regard to due process, the power to provide such an evidentiary rule is qualified in that the fact upon which the presumption or inference is to rest must have some relation to or natural connection with the fact to be inferred, and that the inference of the existence of the fact to be inferred from the existence of the fact proved must not be purely arbitrary or wholly unreasonable, unnatural, or extraordinary. State v. Shelby, supra; Yee Hem v. United States, supra; People v. Kayne, supra. And it is clearly beyond the legislative power to prescribe what shall be conclusive evidence of any fact. O'Donnell v. Wells, 323 Mo. 1170, 21 S.W.2d 762; State v. Shelby, supra. It is 'only essential that there shall be some rational connection between the fact proved and the ultimate fact presumed (or inferred), and that the inference of one fact from proof of another shall not be so

unreasonable as to be a purely arbitrary mandate.' Mobile, J. & K.C.R. Co. v. Turnipseed, supra; Commonwealth v. Kroger, supra; People v. Bigman, supra; People v. Kayne, supra."

The above language was quoted with approval in Borden Co. v. Thompson, 353 S.W.2d 735, wherein the Court decided in declaratory judgment that the legislature had power to create presumptions in the Unfair Milk Sales Practice Act. The Supreme Court therein quotes Justice Cardozo's test of "comparative convenience" of proof as a standard in legislative shifting of the burden of proceeding with the evidence.

The comparative convenience test is again announced in Kansas City v. Wilhoit, Mo. App., 237 S.W.2d 919.

The proposed statute herein involved is similar to New Jersey Revised Statutes, Section 2: 164-1, as amended. Under the New Jersey statute, the jury in a prosecution for receiving stolen property is authorized to find the issue of knowledge against defendant upon proof of possession by defendant of stolen property within one year after it was stolen unless the defendant satisfies the jury that he did not have such knowledge. This statute is construed in State v. Laster, Supreme Court of New Jersey, 174 A2d 486, wherein the Court states:

"\* \* \* The statute does not shift the burden of proof, nor deprive a defendant of due process but is merely an evidentiary rule whereby the accused must go forward with an explanation to rebut the permissive presumption. State v. Lisen, 129 N.J.L. at pages 571-572, 30 A2d 593.

\* \* \* \* \*

'The practical effect of the presumption of guilty knowledge arising out of possession of stolen property is to require the accused to go forward with the evidence and explain his possession, the jury being instructed that they may find him guilty in the absence of any reasonable explanation.' (The Court's Emphasis)"

Please note that the New Jersey statute goes further than the proposed Missouri statute. In New Jersey the case would go to the jury on the question of guilty knowledge, regardless of any contradictory evidence on behalf of the accused. The proposed Missouri statute would permit the court to sustain a motion for directed verdict on a showing that defendant received the property under circumstances which would cause a reasonable man to believe

Senator Lem T. Jones

that the property was not stolen. Such a ruling would be proper where the evidence shows as a matter of law that reasonable minds could not differ in concluding that the defendant acquired the property innocently.

Our legislature has in other statutes shifted the burden of proceeding with the evidence in a criminal case. Section 195.180, RSMo., part of the Missouri Narcotics Code, states:

"In any complaint, information or indictment, and in any action or proceeding brought for the enforcement of any provision of this law, it shall not be necessary to negative any exception, excuse, proviso, or exemption, contained in this law, and the burden of proof of any such exception, excuse, proviso or exemption, shall be upon the defendant."

While not challenged in Missouri, this provision of the Uniform Narcotics Law has been held constitutional in at least one state. *State v. Jourdain*, (Louisiana, 1954), 74 So. 2d 203. By implication the reasonableness of this statute was set out in *State v. Virdure*, Mo., 371 S.W. 2d 196, where the defendant argued that the state had not proved that his possession of narcotics was not by virtue of a prescription. The court stated, 1.c. 202:

"We comment in passing that these facts constituting the claimed exceptions would be peculiarly within the knowledge of the accused. The state would have no way of knowing them, except as to the box container which was in evidence."

This statute then clearly places the burden on a defendant to negative the state's case by showing he was within a lawful exception to the act.

Section 561.470, RSMo., provides that if a check is drawn on insufficient funds it "shall be prima facie evidence of intent to defraud and knowledge of insufficient funds . . . provided such maker shall not have paid the drawee thereof within ten days of receiving notice that such check . . . has not been paid." This statute creates a presumption in favor of the State of Missouri. Opinion of the Attorney General No. 201, Schantz, 8-6-64.

The now repealed criminal bank fraud statute, formerly Section 43.65, RSMo. 1919, made it a crime to receive money in a bank with knowledge of its insolvency and provided that the failure of the bank after the deposit of such funds shall be prima facie evidence of the knowledge by the director of the insolvency. Prior to its repeal, this statute was tested in the Supreme Court as to its constitutionality in *State v. Lively*, Mo., 279 S.W. 76, and therein upheld. Although *State v. Shelby*,

Senator Lem T. Jones

Mo., 64 S.W.2d 269, overruled the Lively case, this was on the basis of an instruction to the jury, not as to the constitutionality of the statute.

We do not overlook the case of People v. Stevenson, Supreme Court of California, 1962, 376 P.2d 297. The court therein had before it a contention of the unconstitutionality of a statute which provided:

"Any person who buys or receives any property which has been stolen or which has been obtained in any manner constituting theft or extortion from any person under the age of 18 years, shall be presumed to have bought or received such property knowing it to have been so stolen or obtained unless such property was sold by such minor at a fixed place of business carried on by the minor or his employer. This presumption may, however, be rebutted [and overcome] by proof."

The court held the quoted part of the statute to be unconstitutional for lack of any rational connection between the fact of acquisition and the presumed fact of guilty knowledge. The opinion states that a presumption of one fact from evidence of another violates due process if there is no rational connection between the fact proved and the fact presumed, citing Tot v. United States, 319 U.S. 463, 63 S.Ct. 1241; Bailey v. Alabama, 292 U.S. 219, 31 S.Ct. 135; People v. Wells, 33 Cal.2d 330, 202 P.2d 203; People v. Scott, Cal.2d 774, 154 P.2d 517. The court ruled that the proved fact must be at least a "warning signal" of the presumed fact and have a "sinister significance." We quote the following language, 1.c. 299:

"\* \* \* The presumption is equally applicable where the minor is himself the thief or where he obtained the property honestly and conducts himself with respect to it in a manner not arousing suspicion. It applies both to one who 'buys' . . . and to one who 'receives' . . . , including a person who borrows property or accepts possession as a temporary accommodation to the minor without any personal benefit. . . . Nor is the operation of the presumption limited to situations where acquisition of the property occurs soon after the theft or where there is some incriminating conduct by the accused in addition to acquisition, such as his silence or false explanation upon questioning by the police."

"\* \* \* It has a scope significantly beyond that of the rule that an inference of guilt

Senator Lem T. Jones

is permissible where recently stolen property is found in conscious possession of a defendant who gives a false explanation regarding his possession or remains silent under circumstances indicating a consciousness of guilt. (See People v. McFarland, Cal., 26 Cal. Rptr. 473, 376 P. 2d 449."

Without purporting to decide which view is better reasoned, that of California or that of New Jersey, it seems that the latter, upholding the constitutionality of a rebuttable presumption of guilty knowledge from the fact of possession of stolen property within one year of the theft, creates no departure from the rules announced in the authorities above cited.



PEACE OFFICERS:  
FIREARMS:  
WEAPONS:  
PROBATION AND PAROLE:

Probation and parole officers are exempt from the provisions of Sec. 564.610 RSMo Cum. Supp. 1965, relating to carrying concealed weapons.

OPINION NO. 288

June 28, 1966

Honorable Charles W. Kunderer  
Assistant Circuit Attorney  
City of St. Louis  
Municipal Courts Building  
St. Louis, Missouri



Dear Mr. Kunderer:

This is in answer to your request for an opinion of this office on the question whether probation and parole officers are exempted from the provisions of Sec. 564.610 RSMo Cum. Supp. 1965, relating to carrying concealed weapons.

Sec. 564.610 RSMo Cum. Supp. 1965 reads as follows:

"If any person shall carry concealed upon or about his person a dangerous or deadly weapon of any kind or description, or shall go into any church or place where people have assembled for religious worship, or into any schoolroom or place where people are assembled for educational, political, literary or social purposes, or to any election precinct on any election day, or into any courtroom during the sitting of court, or into any other public assemblage of persons met for any lawful purpose other than for militia drill, or meetings called under militia law of this state, having upon or about his person, concealed or exposed, any kind of firearms, bowie knife, spring-back knife, razor, metal knucks, bill, sword cane, dirk, dagger, slung shot or other similar deadly weapons or shall, in the presence of one or more persons, exhibit any such weapons in a rude, angry or threatening manner, or shall have any such weapon in his possession when intoxicated, or, directly or indirectly, sell or deliver, loan or barter to any minor any such weapon, without the consent of



Honorable Charles W. Kunderer

the parent or guardian of such minor, he shall, upon conviction, be punished by imprisonment in the penitentiary not exceeding five years, or by fine of not less than one hundred nor more than one thousand dollars, or by imprisonment in the county jail not less than fifty days nor more than one year, or by both such fine and imprisonment; provided, that nothing contained in this section shall apply to legally qualified sheriffs, police officers and other persons whose bona fide duty is to execute process, civil or criminal, make arrests, or aid in conserving the public peace, nor to persons traveling in a continuous journey peaceably through this state."  
(Emphasis supplied)

Section 549.265 RSMo (Supp.1965) provides that, with regard to persons paroled from confinement in Missouri, "Any parole or probation officer may arrest such prisoner without a warrant or may deputize any other officer with power of arrest to do so by giving him a written statement setting forth that the prisoner has, in the judgment of the parole or probation officer, violated the conditions of his parole."

Subsection 4 of Sec. 549.265, supra, provides that in the case of a parolee from another jurisdiction, "Any parole or probation officer may arrest such parolee without a warrant, or may deputize any other officer with power to arrest to do so by giving him a written statement setting forth that the defendant has, in the judgment of the parole or probation officer, violated the conditions of his parole."

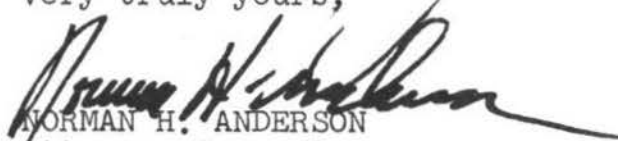
Thus, it is the duty of probation and parole officers to make arrests. This brings them within the proviso of Sec. 564.610, supra, and they are exempt from the prohibition against carrying concealed weapons.

#### CONCLUSION

It is the opinion of the Attorney General that probation and parole officers are exempt from the provisions of Sec. 564.610 RSMo Cum. Supp. 1965, relating to carrying concealed weapons.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Donald L. Randolph.

Very truly yours,

  
NORMAN H. ANDERSON  
Attorney General

TRANSPORTATION OF BUILDINGS:  
OVER OR ACROSS PUBLIC HIGHWAYS:  
TELEPHONE WIRES: RAISING:

Holder of permit to move building across or over public highway under Section 229.230 to 229.260 RSMo. 1959, unauthorized to require company with telephone wires along building transportation route to raise its wires to allow building to pass underneath. Telephone wires not "transmission lines" within meaning of sections, which sections are inapplicable to telephone wires. In its discretion, company may require cash deposit in advance from permit holder to cover expense of raising wires to allow building passage thereunder.

October 18, 1966

OPINION NO. 289

Honorable William C. Esely  
Prosecuting Attorney  
Harrison County  
Bethany, Missouri



Dear Mr. Esely:

This office is in receipt of your request for an opinion as to whether or not telephone lines and/or wires are included under provisions of Section 229.240, 229.250 and 229.260 RSMo., 1959.

In your letter of June 3, 1966, you clarified your inquiry and said letter reads in part as follows:

"My question was asked by a party who is in the business of moving houses or other buildings. When a telephone company was requested to raise their lines so that a building could be moved under them, that company insisted that the house mover pay them for expenses they claimed before they (the telephone company) would raise the lines. In other words, they require deposit of cash covering such claimed expenses.

Section 229.260 does not specifically name telephone lines but does mention "transmission lines." My question is specifically whether a telephone company can refuse to raise its lines unless a cash or other deposit is made to them."

Honorable William C. Esely  
Page 2

We now understand the inquiry of the opinion request to be that stated in your last letter, a portion of which is quoted above, and which inquiry we have underscored.

Sections 229.230 to 229.290 RSMo., 1959, contain the statutory procedure for obtaining permits, to move houses, buildings or other structures upon, over or across public highways, outside the limits of cities of the first, second or third class, or charter cities in this state.

If it is specified in the application for permit to the county clerk, that it will be necessary to cut, remove, raise or in any way interfere with any electric wires, transmission lines, or the feed or trolley wires of any interurban railroad, or to move any poles bearing such wires or cables, it is the duty of the county clerk, under Section 229.250 to give at least five days notice to the owners or operators of such wires, feed wires, transmission wires or trolley wires of the time and place, when and where the removal of the poles, cutting, raising or otherwise interfering with said wires will be necessary.

Section 229.260, provides the procedure to be followed by the owner or operator in removing the poles, cutting, raising or otherwise interfering with its wires to permit the passage of the building or structure over or across the highway. The expense of the removal of poles, cutting, raising, etc., of wires shall be borne by the owner or operator of same. The mover of the building or other structure cannot remove any poles, or otherwise interfere with the cutting of or removal of any wires, except when the owner or operator, after proper notice, refuses to do so.

As indicated in your letter, Section 229.260 makes no mention of telephone wires, but does mention "transmission lines." However, "transmission lines" do not include telephone wires as we shall presently show.

Sections 229.230 to 229.290 RSMo., 1959, have been in effect in their present form for many years. This is particularly true as to Sections 229.230, 229.240, 229.260 and 229.280, which were formerly Sections 10739 to 10741 inclusive, RSMo., 1919. Said sections were construed by the Springfield Court of Appeals in the case of Southwestern Bell Telephone Company v. Drainage District No. 5, of Pemiscot County et al, 247 S.W. 494.

In this case plaintiff recovered a judgment of \$58.29 in the trial court for damages sustained when the defendants cut plaintiff's telephone wires on poles along a public road intersecting defendant's drainage ditch. At l.c. 495, the appellate court said:

"(3) There is another reason why defendant must fail on this appeal, and that is because Acts 1917, Sections 10739 to 10741, inclusive, nowhere provide for the removal of telephone wires. The act describes electric wires, transmission wires, and trolley wires. The headnote of the compiler of Section 10739 is not a part of the law and in no way binding. See *State v. Maurer*, 255 Mo. 152, 164 S.W. 531, Ann. Cos. 1915 C. 178. Respondent's attorneys have printed what they say is a copy of the Senate Journal, Forty-Ninth General Assembly, Regular Session 1917, pp. 1130, 1131, and not disputed by appellants' attorneys. From this it clearly appears that telephone wires, cable, etc., was stricken from the bill as originally introduced, and passed after such portion as referred to telephone and telegraph companies was stricken out. Probably the purpose of the bill was to provide for removal of wires carrying deadly electricity, and which, of course did not apply to telephone wires."

If the party referred to in the opinion request obtains the permit to move a house or other building or structure across a highway, as required by Section 229.230, he will be in no better position legally than before obtaining the permit, as such permit does not grant him the right to have raised, cut or removed any telephone wires or poles on the highway right of way, which interfere with his moving of a building over or across such highway.

In *Southwestern Bell Telephone Company v. Drainage District No. 5*, supra, the court specifically held that sections 229.240 to 229.260 RSMo., 1959, do not apply to telephone lines nor authorize removal of telephone wires. Consequently, a house mover, although he may have obtained the necessary permit, is not afforded any legal remedy under said sections by which he may force a telephone company to raise, cut or remove its telephone wires or poles, which prevent the passage of the moving building over the highway.

Honorable William C. Esely  
Page 4

In view of the foregoing, it is our thought that the telephone company referred to above, may in its discretion, refuse to raise its telephone wires located on the right of way of a public highway, to permit the moving of a building across said public highway, unless the mover makes a cash or other deposit in advance with the telephone company to cover expense of raising its said wires.

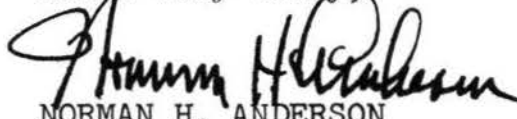
We do not consider the power, if any, of the Public Service Commission to regulate charges for raising telephone wires or the reasonableness of such charges.

#### CONCLUSION

It is the opinion of this office that the holder of a permit to move a building across or over a public highway under provisions of Sections 229.230 to 229.260 RSMo., 1959, is not authorized to require a company with telephone wires located along the building transportation route, to raise its wires sufficiently to allow the building to pass underneath, because telephone wires are not "transmission lines" within the meaning of said terms. Such company, in its discretion, may require a cash deposit in advance from the permit holder, to cover expense of raising its wires to allow such building passage thereunder.

The foregoing opinion, which I hereby approve was prepared by my assistant, Paul N. Chitwood.

Yours very truly,



NORMAN H. ANDERSON  
Attorney General



CONFLICT OF INTEREST:  
LEGISLATORS:  
GENERAL ASSEMBLY:  
SENATORS:  
REPRESENTATIVES:

1. The receipt by Representative F. E. Robinson, Knox County, of \$125.00 per month as Executive Vice President of the Missouri Motel Association does not bring him within the purview of the State Conflict of Interest Law in that this amount of money does not constitute a substantial personal or private interest within the meaning of that law (2) A member of the General Assembly who has a substantial or private interest in any measure or bill proposed or pending before the General Assembly must file a written report of the nature of that interest before he passes on the measure or bill. (3) The Conflict of Interest Law, Section 105.460, RSMo Cum. Supp. 1965, applicable to members of the General Assembly does not prohibit a member of the General Assembly from voting on pending legislation even though he has a substantial personal or private interest in any pending legislation, if prior to his voting on that pending legislation he has filed a written report of the nature of his interest in that legislation with the Chief Clerk of the House or the Secretary of the Senate.

OPINION No. 294

May 16, 1966

Honorable A. Clifford Jones  
Senator  
9 Clermont Lane  
Clayton, Missouri

Dear Senator Jones:



This is in response to your request for an opinion dated April 27, 1966, which reads as follows:

"Please give me an opinion immediately on whether Rep. F. E. (Buck) Robinson has the right to vote, under the conflict of interest law, on Senate Bill 8, Senate Bill 9 and Senate Bill 10.

Please give me this opinion immediately."

In response to your request for an opinion we wrote you on April 28, 1966, as follows:



Honorable A. Clifford Jones

"This will acknowledge receipt by Norman H. Anderson, Attorney General, of your opinion request dated April 27, 1966, which has been numbered 294, in which you request an opinion 'on whether Rep. F. E. (Buck) Robinson has the right to vote on Senate Bill 8, Senate Bill 9 and Senate Bill 10.' We presume that your reference to Senate Bill 8, 9 and 10 has reference to pending bills regulating outdoor advertising adjacent to the highway systems relating to junkyards and authorizing the Highway Commission to acquire, maintain and beautify areas adjacent to highways. We also presume that since you refer to Representative F. E. Robinson you are referring to the State Representative of Knox County. We further presume that your reference to the Conflict of Interest Law has reference to the statute that has been numbered 105.460, RSMo Cum. Supp. 1965, requiring any member of the general assembly who has a substantial personal or private interest in any measure or bill to file a written report of the nature of the interest with the Chief Clerk of the House. This office is not advised of the material relevant facts concerning Mr. Robinson's interest in bills to which you refer. Perhaps if you could advise us the material relevant facts which pertain to the Conflict of Interest question which you have raised, we would be in a better position to comment on the application of that statute."

Since our letter of April 28, 1966, to you we have heard nothing further and since you have chosen not to furnish us the information requested, we have sought to obtain what information we could from other sources pertaining to the subject. We have been advised that Mr. F. E. Robinson is "Executive Vice President of the Missouri Motel Association at a salary of \$125.00 per month."

The applicable section of the Conflict of Interest Law pertaining to members of the General Assembly is Section 105.460, RSMo Cum. Supp. 1965. It provides as follows:

Honorable A. Clifford Jones

"The governor, lieutenant governor and any member of the general assembly who has a substantial personal or private interest in any measure or bill proposed or pending before the general assembly shall, before he passes on the measure or bill, file a written report of the nature of the interest to the chief clerk of the house or the secretary of the senate and such statement shall be recorded in the journal. However, if the governor, lieutenant governor or any member of the general assembly desires, at the beginning of any regular or special session, or any time during said regular or special session, to disclose substantial interests that he or she may have at any time during the session then he or she shall thereafter be relieved from filing a written report on each measure or bill proposed or pending. Said disclosure by anyone named in this section of substantial interests shall be filed in writing with the chief clerk of the house or the secretary of the senate and shall be recorded in the journal. If during the session a person named in this section and who has filed substantial interests shall require the filing of a further substantial interest as herein defined then he may add same to his filing as herein provided and the same shall be recorded in the journal."

It is to be noted that there is no provision referable to Section 105.460 for a penalty for violation thereof.

Section 105.460 requires members of the General Assembly who have a substantial personal or private interest in any measure or bill pending before the general assembly to file a written report of the nature of the interest.

Section 105.450 (5) defines "Substantial personal or private interest in any measure or bill" as "any interest in a measure or bill which results from the combined definitions of subsections (2) and (4) of this section."

Subsections (2) and (4) provide as follows:

Honorable A. Clifford Jones

"(2) 'Business entity', a corporation, association, firm, partnership, proprietorship, or business entity of any kind or character;"

"(4) 'Substantial interest', ownership by the individual, or his spouse directly or indirectly, of ten per cent or more of any business entity, or of an interest having a value of ten thousand dollars or more, or the receipt by an individual or his spouse of a salary, gratuity, or other compensation or remuneration of six thousand dollars, or more, per year from any individual, partnership, organization, or association."

It is to be noted that Section 105.450 (4) defines a substantial interest as ownership of ten percent or more of any business, or of an interest having a value of ten thousand dollars or more. We are not advised whether Mr. Robinson owns ten percent or more of the Motel Association or whether whatever he owns has a value of ten thousand dollars. However, in the absence of facts to the contrary, we have to assume that he or his spouse does not own ten percent or more of the Association or that the interest which they own does not have a value of ten thousand dollars or more.

We are directly advised, however, that Representative Robinson receives a salary of \$125.00 per month. Said definition section provides if he receives a "salary, gratuity, or other compensation or remuneration of six thousand dollars or more, per year" it shall be deemed a substantial interest. It is apparent that \$125.00 per month does not equal six thousand dollars per year. It therefore would appear that if the facts we have are correct, Section 105.460 would not require a member of the General Assembly under these facts to "file a written report of the nature of the interest with the Chief Clerk of the House."

The language of Section 105.460 requires any member of the General Assembly who has a substantial or private interest in any measure or bill proposed or pending before the General Assembly to file a written report of the nature of that interest before he passes on the measure or bill. No penalty however, is provided for the failure to comply with this mandatory provision.

We find no provision in the law which denies to any member of the General Assembly the right to vote on any pending legislation even though he has a substantial personal or private interest in

Honorable A. Clifford Jones

any pending measure or bill, if prior to his voting on such pending legislation he has filed a written report of the nature of his interest in that legislation with the Chief Clerk of the House or the Secretary of the Senate.

CONCLUSION

It is the opinion of this office that:

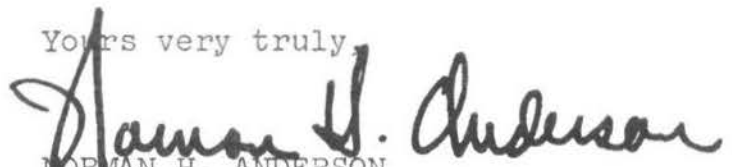
1. The receipt by Representative F. E. Robinson, Knox County, of \$125.00 per month as Executive Vice President of the Missouri Motel Association does not bring him within the purview of the State Conflict of Interest Law in that this amount of money does not constitute a substantial personal or private interest within the meaning of that law. As set out in this opinion a substantial interest as defined in the Conflict of Interest Law is one in which the individual's annual remuneration is six thousand dollars per year or more.

2. A member of the General Assembly who has a substantial or private interest in any measure or bill proposed or pending before the General Assembly must file a written report of the nature of that interest before he passes on the measure or bill.

3. The Conflict of Interest Law, Section 105.460, RSMo Cum. Supp. 1965, applicable to members of the General Assembly does not prohibit a member of the General Assembly from voting on pending legislation even though he has a substantial personal or private interest in any pending measure or bill, if prior to his voting on that pending legislation he has filed a written report of the nature of his interest in that legislation with the Chief Clerk of the House or the Secretary of the Senate.

The foregoing opinion, which I hereby approve, was prepared by my assistant, J. Gordon Siddens.

Yours very truly,

  
NORMAN H. ANDERSON  
Attorney General

July 26, 1966

OPINION NO. 295  
Answered by Letter  
Chitwood

Honorable Fielding Potashnick  
Prosecuting Attorney for  
Scott County  
P. O. Box 459  
310 East Center  
Sikeston, Missouri



Dear Mr. Potashnick:

This office is in receipt of your request for a legal opinion, which reads as follows:

"A village has been incorporated in Scott County by appropriate order of the County Court and a first Board of Aldermen was appointed by the court. This was sometime prior to 1961.

"No elections for the Board of Aldermen have ever been held in the village. Would it now be in order for the village to hold a special election for aldermen and if so, for what terms would each be elected?"

Section 80.020 RSMo., 1959, relates to the procedure for incorporation of villages, and Section 80.040 RSMo. Cum. Supp. 1965, provides the corporate powers and duties of every village so incorporated shall vest in a board of trustees. Said section 80.040, reads as follows:

"The corporate powers and duties of every village so incorporated shall be vested in a board of trustees, to consist of five members, unless such town shall contain more than twenty-five hundred inhabitants, in which case such board shall consist of nine members. The first board of trustees shall be appointed by the county court at the time of declaring such town incorporated. If the board consists of five members the county court shall designate two members who shall serve for terms of two years and three members who shall serve for terms of one year. If the board consists of

Honorable Fielding Potashnick

nine members the county court shall designate four members who shall serve for terms of two years and five members who shall serve for terms of one year. Thereafter all members shall serve for terms of two years. The successors for those whose terms have expired shall be chosen by the qualified electors residing in the village on the first Tuesday of April in every year in the manner provided in sections 80.500 to 80.560."

If incorporation proceedings provided by Section 80.020 RSMo., 1959, have been followed, then the village legally came into existence as a municipal corporation. The fact that its organization as such municipal corporation has not been used, its functions unexercised and dormant for several years is of no consequence. If it was once legally incorporated, it will continue as such, as non-user of its franchise is insufficient to end its existence. This principle was held in our opinion to Harold S. Hutchison, dated April 20, 1953. (Copy enclosed).

If the village was legally incorporated, its existence continues, until disincorporated under Sections 80.570 to 80.670 RSMo., 1959. We have no evidence of disincorporation.

As stated, we have assumed the regularity of all the incorporation proceedings. If so, some of the trustees originally appointed, were for one-year terms and others for two-year terms, however, the terms of the entire membership of the board has now expired. Under these conditions it is necessary to choose successors for all the trustees. Section 80.040 supra, requires an election to be held on the first Tuesday of April in each year, and that successor trustees shall serve terms of two years each.

Under said Section 80.040 supra, the terms of office of the first board of trustees did expire long ago, regardless of whether they were appointed for one or two year terms. While it is true no elections have ever been held to choose successors, it does not follow that the village has been without trustees all these past years. In fact the contrary is true, the village has had trustees from the time of its incorporation, to and including the present time.



Honorable Fielding Potashnick

The situation referred to in the opinion request regarding failure to elect trustees of the village is out of the ordinary and is believed to be covered by Section 12, Article VII, Constitution of Missouri. Said Section reads as follows:

"Except as provided in this constitution, and subject to the right of resignation, all officers shall hold office for the term thereof, and until their successors are duly elected or appointed and qualified."

We find no other constitutional provision contrary to this section. It does not appear that any of the village trustees have resigned. Section 12, supra, is applicable to the present situation, and the entire board of trustees appointed by the county court are still in office and will remain therein until their successors will have been duly elected and qualified.

This brings us to that point in our discussion where it is necessary to consider when an election for successors to the first trustees can be held and for what terms those elected trustees shall serve.

Section 80.040 supra, requires an election to be held annually on the first Tuesday in April, for the election of at least two trustees, and covers usual or ordinary circumstances only. The section has no application to unusual, or out of the ordinary circumstances, when for some reason no annual election was held. It is noted that said section neither expressly or by necessary implication prohibits elections of trustees to be held on other days than as set out therein.

It is believed that Section 80.560 RSMo., 1959 is applicable to unusual, or out of the ordinary circumstances only, when an election was not held (as provided in) in Section 80.040. Section 80.560 RSMo., 1959, reads as follows:

"In case of the failure of any election of trustees or other officers, a majority of the trustees then in office, or any magistrate of the county in which said town or village is situated, may cause the election to be held on any other day."

Honorable Fielding Potashnick

This section is applicable to the factual situation herein, and the board of trustees are authorized by the section to cause an election to be held on any date they may set, giving due consideration to sections 80.500 to 80.560 RSMo., 1959, relating to the holding of elections in villages.

If such an election is called by the board, trustees are to be elected at such election to succeed those originally appointed by the county court for one and two-year terms. Successor trustees of the one-year term trustees, shall serve until the first Tuesday of April following their election and until their successors are duly elected and qualified and successor trustees of the two-year term trustees, shall serve until the first Tuesday of the second April following their election and until their successors are duly elected and qualified.

After such initial election, future elections should be held according to law, that is annually on the first Tuesday of April at which elections trustees will be elected for two-year terms.

Therefore, it is the opinion of this office, that if a village is legally incorporated, a board of trustees appointed under Sections 80.020 RSMo., 1959, and 80.040 RSMo. Cum. Supp. 1965, absent disincorporation proceedings, it will continue to exist as a municipal corporation, and its first board of trustees remain in office until their successors have been duly elected and qualified, although the village organization and functions have remained dormant since incorporation. Under Section 80.560 RSMo., 1959, where elections have not been held as provided by law, said board may cause an election for successor trustees to be held on any day it chooses. When regular elections have not been held as provided by law since the incorporation of the town and the appointment of the first board of trustees, trustees to succeed those originally appointed for one-year terms shall serve until the first Tuesday of April following their election and trustees to succeed those originally appointed for two-year terms shall serve until the first Tuesday of the second April following their election.

Subsequent elections for trustees for two-year terms shall be held on the first Tuesday in April of each year.

Very truly yours,

NORMAN H. ANDERSON  
Attorney General

PNC/fb

SCHOOLS:  
JUNIOR COLLEGE DISTRICTS:  
BONDS:  
STATE AUDITOR:  
REGISTRATION OF BONDS:

Bonds of Junior College District of Kansas  
City not required to be registered by state  
auditor.

May 13, 1966

OPINION NO. 298

Honorable Haskell Holman  
Auditor of State of Missouri  
Capitol Building  
Jefferson City, Missouri



Dear Mr. Holman:

This is in answer to your request for an opinion as to whether The Junior College District of Metropolitan Kansas City, Missouri a District having a population of over 300,000 as established by the last United States census, is required to register its building bonds with the State Auditor or whether such bonds are exempt from registration under Section 108.300 RSMo.

The Junior College District of Metropolitan Kansas City, Missouri, was organized in 1964 under the provisions of Section 178.770 to 178.890, RSMo. Supp. 1965.

Subsection 2 of Section 178.770, RSMo. Supp. 1965, sets out the general powers of a junior college district as follows:

"2. When a district is organized, it shall be a body corporate and a subdivision of the State of Missouri and shall be known as 'The Junior College District of ....., Missouri' and, in that name, may sue and be sued, levy and collect taxes within the limitations of Sections 178.770 to 178.890, issue bonds and possess the same corporate powers as common and six-director school districts in this state, other than urban districts, except as herein otherwise provided."

Section 108.240 RSMo. provides in part as follows:

"Before any bond, hereafter issued by a county, township, city, town, village or school district or special road district or by virtue of the provisions of chapters 243, 245, 248, and sections 242.010 to 242.690, RSMo, for any purpose whatever, shall obtain validity or be negotiated, such bonds shall first be presented to the state auditor, who shall register the same in a book or books, \* \* \*"

If a junior college district is not a "school district" as such term is used in Section 108.240, bonds of such districts are not required to be registered by the state auditor under such Section.

Honorable Haskell Holman

However, it is our view that a junior college district is a "school district" within the meaning of Section 108.240, because the use of the term "school district" in such Section is not restricted or limited by any definition but includes districts which maintain schools and have the power to issue bonds.

We make no holding as to whether a junior college district is a "school district" as such term is used in other statutes but limit such holding to the meaning of the term "school districts" in Section 108.240.

Section 108.300 RSMo. provides as follows:

"Nothing in the provisions of sections 108.240 to 108.300 relating to the registration of bonds shall be so construed as to include any bonds that have been or may be issued by any county of the first class or city or school district having a population of over three hundred thousand inhabitants, as established by the last United States census."

Since the Junior College District of Metropolitan Kansas City, Missouri, has a population of over three hundred thousand inhabitants, as established by the last United States census, as stated in your letter, the bonds of said district are exempt from registration by the state auditor under Section 108.300.

It could be contended that Section 108.300 does not apply to a junior college district which was organized under a statute enacted long after the enactment of such Section.

Subsection 2 of Section 1.100 RSMo., provides as follows:

"2. Any law which is limited in its operation to counties, cities or other political subdivisions, having a specified population or a specified assessed valuation, shall be deemed to include all counties, cities or political subdivisions which thereafter acquire such population or assessed valuation as well as those in that category at the time the law was passed."

Under the provisions of Subsection 2 of Section 1.100, quoted above, the exemption granted by Section 108.300 is applicable to The Junior College District of Metropolitan Kansas City, Missouri, even though such District was organized after the enactment of Section 108.300.

Honorable Haskell Holman

CONCLUSION

It is the opinion of this office that the bonds of The Junior College District of Metropolitan Kansas City, Missouri, are not required to be registered by the State Auditor.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. C. B. Burns, Jr.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Norman H. Anderson".

NORMAN H. ANDERSON  
Attorney General

ELECTION: The requirement of Section 120.390 RSMo, "to  
TIME: publish such notice for three consecutive  
NOTICE: weeks next prior to said primary" is satis-  
PUBLICATION: fied by three separate insertions, one in  
each of three consecutive weeks, so that  
the last insertion occurs at the latest on  
the day next prior to the primary election,  
and at the earliest on the second Sunday  
next prior to the primary election.

OPINION NO. 300

June 23, 1966

Honorable David Thomas  
Prosecuting Attorney  
Carroll County  
Carrollton, Missouri



Dear Mr. Thomas:

This is in answer to your request for an opinion of this office on the interpretation of Section 120.390 RSMo. You inquire whether four insertions are required in each newspaper in order to satisfy the publication of notice provision of the statute, or whether three would be sufficient.

Section 120.380 RSMo, states:

"At least eighty-five days before any primary preceding a general election, the secretary of state shall transmit to each county clerk a certified list containing the name and post office address of each person who shall have filed declaration papers in his office and entitled to be voted for at such primary, together with a designation of the office for which he is a candidate and the party or principle he represents.

Section 120.390 RSMo, states:

"Such clerks shall, upon receipt thereof, publish, under the proper party designation, the title of each office, the names and addresses of all persons who shall have filed declaration papers, giving the name and address of each, the date of the primary, the



Honorable David Thomas

hours during which the polls will be opened and that the primary will be held at the regular polling places in each precinct. It shall be the duty of the county clerk to publish such notice for three consecutive weeks next prior to said primary."

In Russell v. Croy, 164 Mo. 69, the Supreme Court had before it the interpretation of a constitutional provision which read in part, "Shall be published with the laws of the session at which they are proposed, and also in some newspaper, if such there be, in each county in the State for four consecutive weeks next preceding the general election then next ensuing..." Objection was made that the notice given occurred over a period of less than twenty-eight days. The court stated, l.c. 93,:

"The Constitution uses the words 'four consecutive weeks.' The word 'week' in its most accurate sense means seven consecutive days beginning with Sunday; in that sense it is most usually used. But it is also appropriately used to mean seven consecutive days beginning with any day. If we mark off the four weeks next preceding Tuesday, November the 6th, according to the first meaning of the word above given, then we would have the four weeks beginning each, Sunday October the 7th, 14th, 21st and 28th, and ending Saturday, November the 3d. Within that meaning of the word those are the particular four weeks specified by the Constitution during which in each the notice must be published once. If we mark them off on the calendar by periods of seven days, not regarding Sunday as the first of each, then we would have four weeks beginning each, Tuesday October the 9th, 16th, 23d and 30th, and ending Monday November the 5th, and within each of those periods there must be a publication. Whether we begin to count the week with Sunday or Tuesday, the four that we so mark off are the four which the Constitution calls for, and none other will satisfy. The record in this case shows that in each of those weeks, whether marked off by one rule or the other, there was a publication of the notice with one exception, that is, if we begin to count with Tuesday, October the 9th, there was no publication that week in Dallas county because the only paper in the county was issued on Monday alone."

The same interpretation applies to the notice provision of Section 120.390, supra. It requires that there must be a publication within each of the three weeks next preceding the election.

Honorable David Thomas


The last publication may be more or less than seven days before the election and the first may be more or less than twenty-one days prior thereto, within the defined limitation. The "weeks" involved herein may be regarded as beginning either on Sunday or on Tuesday. If each week is considered to begin on a Sunday, the earliest date for the last publication would be the second Sunday next prior to election day (the first day of the week prior to the week that includes election day). If we regard each week as beginning on Tuesday, the latest date for the last publication would be the last day of the week prior to the week that includes election day, which is the Monday next before election day (one day prior to election day).

CONCLUSION

It is, therefore, the opinion of this office that the requirement of Section 120.390 RSMo "to publish such notice for three consecutive weeks next prior to said primary" is satisfied by three separate insertions, one in each of three consecutive weeks, so that the last insertion occurs at the latest on the next day prior to the primary election, and at the earliest on the second Sunday next prior to the primary election.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Donald L. Randolph.

Very truly yours,

  
NORMAN H. ANDERSON  
Attorney General

June 13, 1966



Honorable Carl D. Gum  
Prosecuting Attorney for Cass County  
Court House  
Harrisonville, Missouri 64701

Dear Mr. Gum:

This is in reference to your request for an opinion from this office concerning the question whether an individual who registered under Section 114.060, RSMo 1959, can vote in person at an election or whether he can vote only by absentee ballot.

Enclosed herewith is an opinion issued by this department on November 3, 1950, to Mr. C. B. Burns, Prosecuting Attorney, Brookfield, Missouri to the effect that an absentee ballot is void and should not be counted if the elector is present in the county on the day of the election.

Also enclosed herewith is an opinion issued by this office on March 22, 1966, to Honorable William Pannell, Prosecuting Attorney, Jefferson County, Hillsboro, Missouri, concerning the procedure to be followed by the county clerk in registering voters under Section 114.130, RSMo 1959.

We believe that the answers to your question will be found in these two opinions. If you have any further questions, please advise.

Very truly yours,

NORMAN H. ANDERSON  
Attorney General

MM:mm/aa

Enclosures: 2

INSURANCE: Articles of Incorporation of National General Insurance Company

Opinion No. 310 (1966)

May 20, 1966

Honorable Robert D. Scharz  
Superintendent  
Division of Insurance  
Jefferson Building  
Jefferson City, Missouri



Dear Mr. Scharz:

By letter dated April 28, 1966, you request an opinion from this office as to whether documents submitted by National General Insurance Company are in accordance with Chapter 379 of the Statutes and are not inconsistent with the Constitution and laws of the state and the United States. These documents consist of photo-copies of the Declaration of Intention of the incorporators of National General Insurance Company, the Articles of Incorporation of such corporation to be formed under the provisions of Chapter 379, RSMo 1959, and the publisher's affidavit as to publication of said Articles as required by section 379.030 and 379.040, RSMo 1959.

An examination of the documents referred to in the preceding paragraph has been made as required by section 379.040, RSMo 1959, and the documents aforesaid are found by this office to be in accordance with the provisions of sections 379.010 through 379.160, and not inconsistent with the Constitution and laws of this state and the United States.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Thomas J. Downey.

Very truly yours,

NORMAN H. ANDERSON  
Attorney General

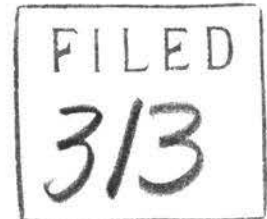
COUNTY BOARDS OF EDUCATION:  
SCHOOLS:

There is no statutory method for breaking a deadlock in the election of president of the county board of education. Until the deadlock is resolved, the current president will continue in office pursuant to Section 105.010, RSMo 1959.

OPINION NO. 313

July 5, 1966

Honorable Richard M. Webster  
State Senator, 32nd District  
204 South Garrison  
Carthage, Missouri



Dear Senator Webster:

This opinion is rendered in response to your request for an official ruling.

Your letter makes the following inquiry:

"What can be legally done when a county board of education is unable to break a tie vote in electing the president of the county board of education for the ensuing year?"

Section 162.121, RSMo Supp. 1965, provides for the election of a president of a county board of education as follows:

"The county board of education, within four days after its election, shall meet in the office of the county superintendent of schools and organize by electing one of its members president. The county superintendent of schools is the secretary of the board. \* \* \* "

To our knowledge there is no provision in the statutes relevant to county boards of education which provides for the resolution of a deadlock in the election of the president of the county board of education. We note that the legislature has made such provision for resolving tie votes on a question before a six director school district, to wit: Section 162.301(3), RSMo Supp. 1965. This provision is, however, not applicable to county boards of education.

Honorable Richard M. Webster

Therefore, when there is a tie vote in the election of president of the county board of education the only method of breaking the deadlock is reconsideration by the county board members until a majority can agree on a president.

Until the deadlock is resolved the current president will continue in office pursuant to Section 105.010, RSMo 1959.

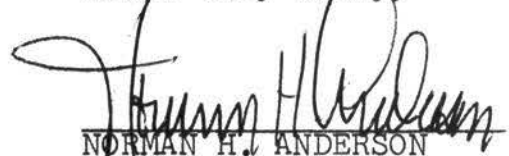
"All officers elected or appointed by the authority of the laws of this state shall hold their offices until their successors are elected or appointed, commissioned and qualified."

The president of a county board of education is an officer elected by the authority of the laws of this State, to wit: Section 162.121. Therefore, he shall hold his office until his successor is elected and qualified.

It is our understanding that the member of the county board who was president last year is still a member of the board. Therefore, he would hold over until the new president is elected.

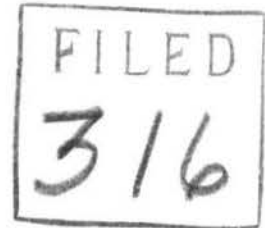
The foregoing opinion, which I hereby approve, was prepared by my assistant Louis C. DeFeo, Jr.

Yours very truly,

  
NORMAN H. ANDERSON  
Attorney General

LCD:df





June 13, 1966

Honorable James W. Williams  
Missouri House of Representatives  
First District - Buchanan County  
2010 North Fourth Street  
St. Joseph, Missouri

Dear Representative Williams:

This is in response to your request dated May 13, 1966, enclosing the letter of Joseph L. Flynn, City Councilman respecting the legality of the tax levy for collection and disposal of garbage for the City of St. Joseph.

We have studied the applicable ordinance, the recent opinion of the City Counselor and the Opinion of the City Counselor dated January 17, 1964, relating to this subject and we have independently researched and considered this question.

We agree with the Conclusion of the City Counselor.

Very truly yours,

NORMAN H. ANDERSON  
Attorney General

cc: Thomas A. Wallen, D.D.S.  
City Councilman

Edward P. Speiser  
City Attorney

PERSONAL PROPERTY: A Serviceman, resident of Missouri, although  
TAXES: he may be outside the state on military orders  
MILITARY PERSONNEL: is liable for taxes on tangible personal property  
located in Missouri on January 1st of taxable  
year.

June 28, 1966

OPINION NO. 318

Honorable Roy L. Carver, Director  
Division of Veterans Affairs  
State Office Building  
P.O. Box 147  
Jefferson City, Missouri



Dear Mr. Carver:

This opinion is in response to your inquiry whether a serviceman in the Armed Forces, whose legal domicile is in Missouri, but who is presently stationed outside the State pursuant to military orders, would be liable for personal property taxes in this State.

In a conversation with a member of this office, you stated we are to assume that such tangible personal property was physically located in Missouri on January 1, of the tax year in question.

Section 137.075, RSMo 1959 provides in part "that every person owning or holding \*\*\* tangible personal property on the first day of January \*\*\* shall be liable for taxes thereon during the calendar year."

We have carefully considered Section 574 of Public Law 87-771, 76 Stat. 768, 50 USCA 574, as amended, (commonly called the Soldiers and Sailors Relief Act) and other allied sections found in Article V of the above cited law. We find no provisions contained therein that exempts a serviceman of his obligation as a citizen to pay his taxes, if any, to the state of his residence. Such was not intended. The United States Court of Appeals, 4th Circuit in the case of United States vs. Arlington County, 326 Fed. 2d 929, 933, had this to say:

"[3,4] To put the matter in another way, the Act does not say that the serviceman shall

Honorable Roy L. Carver

not be deemed to have acquired a domicile in the host state because he was there by virtue of military orders--it says he shall not be deemed to have lost his domicile in his 'home' state, and the Act further states that the same condition shall exist with respect to his personalty. Thus we think the Act makes it clear that the Congress intended to exempt the serviceman from taxation on his personal property except by his 'home' state.\* \* \*

See also California vs. Buzard, 86 S.C. 478, 382 U.S. 386, 15 L. Ed. 2d 436, 442.


On the facts you have submitted, Missouri is claimed by the serviceman as his "home" state. We believe therefore that such serviceman is responsible for payment of those taxes levied on his tangible personal property physically located in Missouri on January 1, of the taxable year when imposed by the appropriate taxing authority.

#### CONCLUSION

It is our opinion that a serviceman resident of Missouri, although he may be outside of the state on military orders, is responsible to the appropriate taxing entities for any taxes levied on his tangible personal property which was located in Missouri on January 1, of the taxable year.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Richard C. Ashby.

Yours very truly,

  
NORMAN H. ANDERSON  
Attorney General

June 15, 1966



Board of Election Commissioners  
City of St. Louis  
208 South 12th Boulevard  
St. Louis, Missouri 63102

Attention: Mr. Vincent G. Baumann

Dear Mr. Baumann:

This letter is in response to your request for an opinion dated May 13, 1966, requesting a reconsideration of a former Attorney General Opinion dated May 13, 1954, to Michael J. Doherty. This inquiry really involves the question of whether a candidate is eligible to become a representative as provided by Article III, Section 4 of the Constitution, which provides:

"Each representative shall be twenty-four years of age, and next before the day of his election shall have been a qualified voter for two years and a resident of the county or district which he is chosen to represent for one year, if such county or district shall have been so long established, and if not, then of the county or district from which the same shall have been taken."

The Constitution, however, further provides in Article III, Section 18, as follows:

"Each house shall appoint its own officers; shall be sole judge of the qualifications, election and returns of its own members; \* \* \*"

Under this provision of the Constitution the power to determine the eligibility of a person to hold the office of state representative is vested solely in the House of Representatives and

Board of Election Commissioners  
City of St. Louis

can not be determined either by the Courts, the Executive Branch of the Government or by administrative officers.

The case of Mansur vs. Morris, 196 S.W. 2d 287, among other things, considers the application of Section 120.440 RSMo 1959. Mansur involved the eligibility of a candidate for Magistrate under the Constitution. It did not involve a candidate for State Representative. The opinion makes no reference whatever nor considers Section 18, Article III of the Constitution. We therefore conclude that the Board of Election Commissioners nor this office has authority to rule that a candidate for State Representative may be ineligible to hold the office if elected. We adhere to Attorney General Opinion to Michael J. Doherty dated May 13, 1954.

Yours very truly,

NORMAN H. ANDERSON  
Attorney General

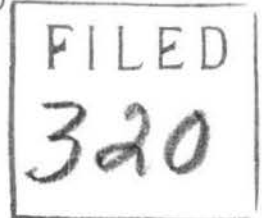
LIQUOR:  
CONSOLIDATION OF CITIES:  
CONSOLIDATION OF MUNICIPALITIES:  
CITIES, TOWNS AND VILLAGES:

If Oakland, a fourth class city under ten thousand population which has liquor by the drink, and Glendale, a fourth class city under ten thousand population which does not have

liquor by the drink, consolidate under Sections 72.150 and 72.155, RSMo Supp. 1965, the new municipality will not have liquor by the drink and to have same will have to hold an election under Section 311.110, RSMo 1959, and related sections for liquor by the drink in the entire new municipality.

November 23, 1966

OPINION NO. 320



Honorable Alfred A. Speer  
Representative, 12th District  
St. Louis County  
Missouri House of Representatives  
840 Alexandria  
Glendale, Missouri

Dear Mr. Speer:

This is in answer to your request for an opinion concerning the question whether in a consolidation of two fourth class cities the part of the new city which formerly allowed liquor by the drink could continue to do so while the part of the new city which did not allow liquor by the drink could remain dry. You have stated that the cities in question are Oakland, which has liquor by the drink, and Glendale, which does not have liquor by the drink.

Section 311.090, RSMo 1959, provides for the sale of liquor by the drink and where such sales are legal. Such sales are not legal in any incorporated city having a population of less than twenty thousand unless authorized by a vote as provided in Sections 311.110, 311.120 and 311.130, RSMo 1959.

We note that both Oakland and Glendale, as of the last census of the United States, had a population of less than ten thousand.

Section 311.110, supra, reads as follows:

"Upon application by petition signed by one-fifth of the qualified voters of any incorporated city, who are qualified to vote for members of the legislature in such incorporated city of this state, the



Honorable Alfred A. Speer

board of aldermen, city council or other proper officials of such incorporated city shall order an election to be held in such incorporated city, at the usual voting precincts for holding any general election for state officers, to take place within forty days after the receipt of such petition, to determine whether or not intoxicating liquor, as defined in this chapter, other than malt liquor containing not to exceed five per cent of alcohol by weight, shall be sold, furnished or given away within the corporate limits of such incorporated city; such election shall be conducted, the returns thereof made and the results thereof ascertained and determined in accordance in all respects with the laws of this state governing general elections for city officers, and the result thereof shall be entered upon the records of such board of aldermen, city council or other proper officials, and the expense of such election shall be paid out of the city treasury, as in the case of an election for city officers; provided, that at an election held under the provisions of this section, no one shall be entitled to vote who is not a resident of such incorporated city, or who is not a qualified voter of such incorporated city; provided, that no such election held under the provisions of this section shall take place on any general election day, or within sixty days of any general election held under the constitution and laws of this state, so that such elections as are held under this section shall be special elections and shall be separate and distinct from any other election whatever; provided further, that the board of aldermen, city council or other proper officials shall determine the sufficiency of the petition presented by the poll books of the last previous city election."

(Emphasis added).

It was under this section that Oakland adopted liquor by the drink.

Honorable Alfred A. Speer

When a proposal for liquor by the drink is approved by the voters and after publication of the results of the election for four consecutive weeks, then the provisions of Chapter 311, RSMo, take effect after the date of the last publication. Section 311.140, RSMo 1959.

You state that Oakland and Glendale plan to consolidate under the provisions of Sections 72.150 through 72.220, RSMo, and in particular to utilize Section 72.155.

Section 72.150, RSMo Supp. 1965, provides for the consolidation of cities and reads as follows:

"When two or more cities, towns or villages, other than those located in counties containing a city, or a part thereof, of more than four hundred thousand and less than seven hundred thousand inhabitants, in this state adjoining and contiguous to each other in the same or adjoining county shall be desirous of being consolidated, it shall be lawful for them to consolidate under one government of the class under which any of them was organized or the class provided for the consolidated population, in the manner and subject to the provisions herein prescribed."

37 Am. Jur., Municipal Corporations, Section 21, says that:

"Where existing municipal corporations are consolidated, usually a new corporation is created and takes the place of the old, and the latter cease to exist and can no longer exercise any corporate power, unless their existence is expressly continued for some specific purpose."

If Oakland and Glendale consolidate, they will become a new corporate entity and as such have no ordinances or government except as provided under the provisions of Sections 72.150 through 72.220, supra.

Section 72.155, RSMo Supp. 1965, provides that consolidation may be instituted by the municipalities by ordinance and that the ordinance, in addition to certain requirements, may contain certain provisions as follows:

Honorable Alfred A. Speer

\* \* \* \*

"2. The ordinance may contain the name of the municipality as consolidated, the form of government to be adopted and the details of transition, such as which officers will serve, which employees shall be retained, what taxes will be collected, what ordinances will be in effect and similar matters for the operation of the consolidated municipality until the new governing body provides otherwise."

Thus, Oakland and Glendale may provide what ordinances should be retained and thus be in effect in the new municipality.

The voters in the respective cities to be consolidated must then vote in a general election for or against consolidation and necessarily for or against what ordinances should be retained. Section 72.170, RSMo Supp. 1965.

The adoption of liquor by the drink, by Oakland, however, was not by ordinance but by a vote at a special election. Therefore, because liquor by the drink must be adopted at an election "separate and distinct from any other election whatever" (Section 311.110) and because as a result of the consolidation the new municipality will be new and have a population of under twenty thousand, it is our opinion that the new municipality cannot retain the Oakland authority and will not have liquor by the drink. The new municipality will be a municipality under twenty thousand that has never itself voted in liquor by the drink.

Since it is our opinion that the new municipality will not have liquor by the drink at all as a result of the consolidation, the answer to your question of whether the Oakland part of the new municipality could continue "wet" and the Glendale part continue "dry" must necessarily be no.

The new municipality to have liquor by the drink will have to hold an election under Section 311.110, *supra*, and related sections. If an election is held, the question voted on is if liquor by the drink shall be permitted in the entire municipality and not only certain sections. We refer you, for your study, however, to *State ex rel. Hewlett v. Womach*, 355 Mo. 486, 196 S.W.2d 809, dealing with the regulation of liquor by municipalities.

#### CONCLUSION

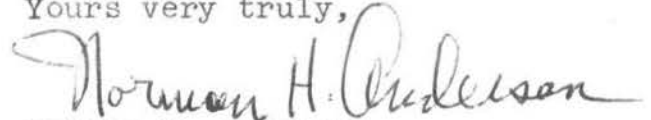
It is the opinion of this office that if Oakland, a fourth class city under ten thousand population which has liquor by the drink, and Glendale, a fourth class city under ten thousand popu-

Honorable Alfred A. Speer

lation which does not have liquor by the drink, consolidate under Sections 72.150 and 72.155, RSMo Supp. 1965, the new municipality will not have liquor by the drink and to have same will have to hold an election under Section 311.110, RSMo 1959, and related sections for liquor by the drink in the entire new municipality.

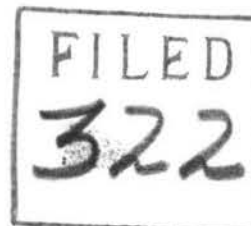
The foregoing opinion, which I hereby approve, was prepared by my Assistant, Walter W. Nowotny, Jr.

Yours very truly,

A handwritten signature in cursive script that reads "Norman H. Anderson". The signature is written in dark ink and is positioned above the printed name and title.

NORMAN H. ANDERSON  
Attorney General

September 20, 1966



OPINION NO. 322  
Answered by Letter-Nowotny

Honorable Haskell Holman  
Auditor for State of Missouri  
Capitol Building  
Jefferson City, Missouri

Dear Mr. Holman:

This is in answer to your request for an opinion on the question of what would be the statutory salary allowable to the clerk of the Hannibal Court of Common Pleas for the years 1961 to 1965, inclusive.

In your request for an opinion you have sent a copy of a Petition for Declaratory Judgment styled Paul O. Munger v. Marion County, Missouri, et al. No. 21658, which was filed on October 12, 1957, in the Hannibal Court of Common Pleas for Mason and Miller Townships, Marion County, Missouri. This petition prays for a declaratory judgment as to the compensation and salary of the Plaintiff as the duly elected, qualified and acting Clerk of the Hannibal Court of Common Pleas.

You also sent us a copy of a Declaratory Judgment rendered on December 28, 1957, by the Judge of the Hannibal Court of Common Pleas for Mason and Miller Townships, Marion County, Missouri, in the case of Paul O. Munger v. Marion County, Missouri, et al. In this judgment the Court found in part as follows:

"The Court finds that the plaintiff is now the duly elected, qualified and acting Clerk of the Hannibal Court of Common Pleas in the County of Marion and State of Missouri; that Marion County has a population of less than 30,000 inhabitants and more than 25,000 inhabitants;

Honorable Haskell Holman

that there has been no judicial determination of the fact in relation to the salary of the Clerk of the Hannibal Court of Common Pleas since the last census; that there is no statute specifically setting the salary of the Clerk of the Hannibal Court of Common Pleas. Section 483.455 V.A.M.S. is not applicable because it applies only to clerks of courts of common pleas in counties having a population of not less than 30,000 inhabitants."

The Court after finding the facts entered the following judgment:

"WHEREFORE, it is ordered, declared and adjudged that by law the Clerk of the Hannibal Court of Common Pleas from this date shall be entitled to the annual compensation as provided by Section 483.330 V.A.M.S. 1949 and amendments thereto, which section now provides an annual compensation of \$4800.00, payable in monthly installments of \$400.00 each month, and such clerk is not entitled to any extra or added compensation as clerk of the Juvenile division, as a Member of the Board of Jury Commissions and Ex-officio Clerk thereof, or any added compensation now provided for additional duties as such clerk."

Finally you also sent us a copy of an Order of the Judge of the Hannibal Court of Common Pleas styled "IN THE MATTER OF THE COMPENSATION OF THE CLERK OF THE HANNIBAL COURT OF COMMON PLEAS." This Order is not dated but was to be effective as of October 13, 1961, and reads in part as follows:

"THEREFORE, to correct the great injustice that would otherwise be done, it is Ordered and Decreed that until Section 483.455 is amended at the next session of the General Assembly of Missouri or is otherwise provided, the Clerk of the Hannibal Court of Common Pleas shall receive the same compensation as is now provided for Circuit Clerks of Third Class Counties where there is a separate Circuit Clerk and a separate Recorder and as provided by Section 483.330, or the sum of \$4,800.00, together with the



Honorable Haskell Holman

additional compensation of \$1,200.00 as provided by Section 483.471, enacted in Senate Bill No. 289 by the 71st General Assembly. This Order to be effective as of October 13, 1961."

Prior to 1961 Section 483.455, RSMo 1959, provided as follows:

"The clerks of courts of common pleas in all counties in this state which now or may hereafter have a population of not less than thirty thousand inhabitants and not more than forty thousand inhabitants, and which said courts of common pleas now have and exercise or may hereafter have and exercise within well defined territorial limits within their respective counties the same exclusive original jurisdiction in both civil and criminal actions as is now had and exercised by circuit courts of this state, shall receive for their services, annually, the sum of two thousand dollars."

We note that in 1957 the population of Marion County where the Hannibal Court of Common Pleas is located was below thirty thousand.

It was in 1957 that the action for declaratory judgment was filed and the judgment rendered declaring the salary of the Clerk of the Hannibal Court of Common Pleas.

Then on July 20, 1961 the legislature amended Section 483.455 to read as follows, RSMo Supp. 1965:

"The clerk of the Hannibal court of common pleas shall receive for his services, annually, the sum of two thousand dollars."

The language of Section 483.455 as it presently reads is explicit and the legislative intent is clear that the salary of the Clerk of the Hannibal Court of Common Pleas is two thousand dollars per year.

Ordinarily this would be the obvious conclusion unless there is a valid, binding and final judgment of a court having jurisdiction of the parties which has made some different ruling respecting the meaning of this statute. As previously indicated, there has been a purported ruling or order by the Hannibal Court of Common Pleas touching this matter. Hence our inquiry must turn to the validity and effect of the Court's order and particularly the authority or jurisdiction of the Court to make the order.

Honorable Haskell Holman

The jurisdiction of a court is the right and power to adjudicate or render judgment concerning the subject matter of a given case. *Swenson v. Swenson*, 299 S.W.2d 523, transferred to 313 S.W.2d 770; *Healer v. Kansas City Public Service Co.*, 251 S.W.2d 66. To have jurisdiction the court must have cognizance of the class of cases to which the one to be adjudged belongs, the proper parties must be present and the point to be decided must be, in substance and effect, within the issue. *Robinson v. Levy*, 217 Mo. 498, 117 S.W. 577.

A judgment is a conclusion of the law on the pleadings and evidence. *Kansas City v. Woerishoeffter*, 249 Mo. 1, 155 S.W. 779. The essentials generally to have a valid and binding judgment are that the sentence, order or adjudication in question be that of a judicial tribunal determining rights of parties in formal proceedings in a final and definite manner where the party seeking judgment has taken proper steps and the adversary has had proper notice. *Ex parte Irwin*, 320 Mo. 20, 6 S.W.2d 597; *In re Condemnation of Land for Opening and Establishing a Public Parkway in Kansas City*, 188 Mo. App. 567, 176 S.W. 529; *In re Phillips' Estate*, 240 Mo. App. 9, 202 S.W.2d 107, affirmed 357 Mo. 947, 211 S.W.2d 728.

The Order of the Hannibal Court of Common Pleas which became effective October 13, 1961, appears to have been made on the Court's own motion. You have informed us that there has been no petition filed on the question of the clerk's salary after Section 483.455 was amended in 1961 setting the salary at \$2,000 per year and that there has been no formal adversary proceeding on this particular factual issue. There was no formal proceeding before the Court for determination, no adverse or contesting parties, and no statute or common law right that we are able to perceive which would give the Court authority or jurisdiction to make the adjudication which it attempted to make. It might be contended the Court has the inherent or common law power to fix the salary of its own clerk. This might be a valid contention but for the express statute to the contrary. Therefore, the Order of October 13, 1961, is not a valid and binding judgment.

Since the Order does not have the force and effect of legally determining the Clerk's salary, it is our opinion that the basic salary of the Clerk of the Hannibal Court of Common Pleas from July 20, 1961, the effective date of Section 483.455, RSMo Supp. 1965, to 1965, inclusive, was two thousand dollars per year and not four thousand eight hundred dollars per year as provided by Section 483.330, RSMo 1959.

This does not, of course, preclude additional salaries and fees for the Clerk as may be provided for by other statutes.

Specifically, Section 483.461, RSMo 1965 enacted in 1961, provides additional compensation of twelve hundred dollars per year for the performance of certain additional duties and Section 483.470,

Honorable Haskell Holman

RSMo 1959, provides additional compensation of three hundred dollars per year for serving as members and ex-officio clerks of the board of jury commissioners for their respective courts.

Therefore, the salary allowable to the Clerk of the Hannibal Court of Common Pleas for the years 1961 to 1965, inclusive, was \$2,000 per year from the effective date of Section 483.455, RSMo Supp. 1965, plus \$1,200 per year from the effective date of Section 483.461, RSMo Supp. 1965, plus \$300 per year as provided by Section 483.470, RSMo 1959.

Very truly yours,

NORMAN H. ANDERSON  
Attorney General

WWN:cw

August 31, 1966

Opinion No. 323  
Answered By Letter  
(Ashby)

Honorable Henry C. Maddox, Director  
Division of Commerce and Industrial Development  
Eighth Floor - Jefferson Building  
Jefferson City, Missouri 65101



Dear Mr. Maddox:

This letter is written to respond to your inquiry whether industrial bonds may be voted for the construction and equipping of a skilled nursing home.

We assume, according to the additional information you subsequently furnished this office that the nursing home in question has the conventional staff such as medical attendants to care for the occupants; kitchen personnel to cook; maintenance personnel to clean; etc. The nursing home would be organized so as to come within the definition found in Section 198.011, RSMo Supp. So considered, we believe that we might find there such items as normal kitchen utensils, appropriate laundry equipment, perhaps some limited medical equipment but little that might be considered as "industrial equipment."

We have discussed what constitutes an industrial plant in our Opinion No. 179, dated March 29, 1966, addressed to you wherein we said:

"Your question is whether Industrial Linens, Inc., is an 'industrial plant', within the meaning of Section 71.790 and thus eligible to receive the benefits provided by Sections

71.790 through 71.850. These sections were enacted in 1961 pursuant to Article VI, Sections 23(a) and 27, of the Missouri Constitution, which provisions were adopted in 1960. Section 27 provides in part:

'Any city or incorporated town or village in this state, by vote of four-sevenths of the qualified electors thereof voting thereon, may issue and sell its negotiable interest bearing revenue bonds for the purpose of paying all or part of the cost of purchasing, constructing, extending or improving any of the following: \* \* \*

(2) plants to be leased or otherwise disposed of pursuant to law to private persons or corporations for manufacturing and industrial development purposes, including the real estate, buildings, fixtures and machinery; \* \* \*.'

"The type of 'plant' for which funds may be acquired is defined in Section 71.790 as:

'(2) "Facility", an industrial plant purchased, constructed, extended or improved pursuant to sections 71.790 to 71.850, including the real estate, buildings, fixtures and machinery;'

'(5) "Project for industrial development" or "project", the purchase, construction, extension and improvement of industrial plants, including the real estate either within or without the limits of such municipalities, buildings, fixtures, and machinery; except that any project of a municipality having fewer than eight hundred inhabitants shall be located wholly within the limits of the municipality.'

"It is difficult to assign a specific and precise meaning to the phrase 'industrial plant.' The enabling constitutional provision speaks of 'manufacturing and industrial development purposes, including the real estate, buildings, fixtures and machinery.' The broad wording of this provision indicates a purpose to aid

and promote manufacturing and industrial development through the State. Since the phraseology includes the words 'manufacturing' and 'industrial' we must conclude that 'industrial' is not included within the meaning of 'manufacturing', and 'industrial plant' must mean something other than a place where goods are manufactured. State ex rel. Kansas City Power & Light Co. v. Smith, Mo. Banc., 111 SW2d 513.

"In the Smith case, supra, the court considered the meaning of the phrase 'industrial establishment' and stated, l.c. 515:

\* \* \* the ordinarily accepted meaning of the phrase "industrial establishment" denotes a place of business "which employs much labor and capital and is a distinct branch of trade; as, the sugar industry." Webster's New International Dictionary. \* \* \*

"The term 'industrial plant' was given a very flexible definition by the Pennsylvania court in North Side Laundry Co. v. Board of Property Assessment, 79 A2d 419, in which it stated, l.c. 421:

\* \* \* The law can do no better than to define an industrial plant as that type of establishment which the ordinary man thinks of as such. Certainly a commercial laundry comes within that definition. \* \* \*

"See also, United Laundries, Inc. v. Board of Property Assessment, 58 A2d 833. In Messenger Publishing Co. v. Board of Property Assessment, 132 A2d 768, using this definition, the court also held that a building and its fixtures in which newspapers were printed were also an 'industrial plant.'

"The phrase as used in Sections 71.790 through 71.850 should be given a reasonable construction



Honorable Henry C. Maddox, Director

so as to give effect to the intent of the legislature. United Airlines, Inc., v. State Tax Commission, 377 SW2d 444. The definition used in the three Pennsylvania cases is in harmony with that used in the Smith case and the commonly accepted meaning of the words as well as the spirit and purpose of the statute in question. In our opinion to determine whether an establishment is an 'industrial plant' as used in Sections 71.790 through 71.850, the Division should determine if it is a business which employs much capital and labor, is a distinct branch of trade and is an establishment which the ordinary man would consider to be an 'industrial plant.' The question then is, whether using this criteria, Industrial Linens, Inc., is an 'industrial plant.'"

We conclude the proposed nursing home, when considered in the light of our comments found in our Opinion No. 179 supra, would not be a "manufacturing or industrial plant" as the term is commonly understood. Therefore, industrial bonds (whether general obligations or revenue bonds) could not be issued under Section 71.790 through 71.850, RSMo Supp., to erect and equip a skilled nursing home.

Yours very truly,

NORMAN H. ANDERSON  
Attorney General

June 15, 1966



OPINION NO. 324  
Answered by Letter-Burns

Honorable Frank M. Karsten  
United States House of Representatives  
Washington, D.C.

Dear Representative Karsten:

This is in answer to your recent letter inquiring as to the amount of money which may be legally expended by a candidate for the Congress, from the First Congressional District in the August Primary Election and November Election in 1966.

Section 129.100, RSMo, provides that the maximum expenditure for a candidate for Congress in the Primary Election and in the General Election shall be the sum of the total number of votes cast for the candidates for president in such district multiplied by eight (8) cents per vote. Expenditure for traveling expenses including hotel or lodging bills are excepted from such limit.

The First District's composition is set out in Section 128.212, RSMo Supp. 1965. Section 128.305, RSMo Supp. 1965, provides that boundaries of townships, wards and precincts within the City of St. Louis and St. Louis County mean the boundary lines of townships, wards and precincts as they existed on July 1, 1960.

We have ascertained from the Board of Election Commissioners of St. Louis City that there were no changes in the wards included within the First Congressional Districts between the dates of July 1, 1960, and the General Election of November 1964.

Under date of May 23, 1966, the Board of Election Commissioners of St. Louis County informed us that the boundary lines of Airport, St. Ferdinand, Normandy and Washington Townships were not changed between July 1, 1960, and the General Election of 1964. The Board also stated that it was assembling information concerning the

Honorable Frank M. Karsten

presidential vote in 1964 in the precincts in Florissant Township included in the First Congressional District as such precincts were constituted, July 1, 1960.

We have not received as yet the information from the St. Louis County Election Board regarding Florissant Township but we can give you at this time a rather close approximation of the amounts that may be legally expended by candidates in the First Congressional District by estimating the November 1964 General Election vote in the part of Florissant Township included in the First Congressional District.

The total votes in the First District excluding Florissant Township was 181,154. Our estimate of the votes in Florissant Township in the First District is 6,194. Hence the total is 187,348 votes.

Since the total vote in the 1964 Election in the First Congressional District for president as estimated was 187,348, under the formula in Section 129.100, candidates are prohibited from expending under state law in excess of \$14,987.84, exclusive of traveling expenses including hotel or lodging bills. This amount can be legally expended under state law at the primary, and the same amount can be legally expended at the general election.

However, Section 248 Title 2 U.S. Code Annotated applicable to the November General Election but not applicable to the August primary provides federal limitation of expenditures insofar as the November General Election is concerned. Such Section provides as follows:

"(a) A candidate, in his campaign for election, shall not make expenditures in excess of the amount which he may lawfully make under the laws of the State in which he is a candidate, nor in excess of the amount which he may lawfully make under the provisions of this title.

(b) Unless the laws of his State prescribe a less amount as the maximum limit of campaign expenditures, a candidate may make expenditures up to ---

(1) The sum of \$10,000 if a candidate for Senator, or the sum of \$2,500 if a candidate for Representative, Delegate, or Resident Commissioner; or

(2) An amount equal to the amount obtained by multiplying three cents by the total number of votes cast at the last general election for all candidates for the office which the candidate

Honorable Frank M. Karsten

seeks, but in no event exceeding \$25,000 if a candidate for Senator or \$5,000 if a candidate for Representative, Delegate, or Resident Commissioner.

(c) Money expended by a candidate to meet and discharge any assessment, fee, or charge made or levied upon candidates by the laws of the State in which he resides, or expended for his necessary personal, traveling, or subsistence expenses, or for stationery, postage, writing, or printing (other than for use on billboards or in newspapers), for distributing letters, circulars, or posters, or for telegraph or telephone service, shall not be included in determining whether his expenditures have exceeded the sum fixed by paragraph (1) or (2) of subdivision (b) as the limit of campaign expenses of a candidate." (June 25, 1910, c. 392, §§ 8, 9, 36, Stat. 824; Aug. 19, 1911, c. 33, §2, 37 Stat. 26; Aug. 23, 1912, c. 349, 37 Stat. 360; Feb. 28, 1925, c. 368, Title III, § 309, 43 Stat. 1073.)"

The total vote in 1964 for congressional candidates in the First Congressional District of Missouri was 183,199. Based on such vote and multiplying this number by three (3) cents a total of \$5,495.97 is obtained.

However, the Federal statute provides that in no event shall the maximum expenditure exceed \$5,000 by a candidate for Representative. Therefore the maximum expenditure under the Federal statute by a candidate at the November General Election is \$5,000 in addition to expenditures excluded under Subsection (c) of Section 248 Title 2, U.S.C.A.

Therefore, it is our view that State Law prohibits a candidate for the First Congressional District from expending more than \$14,987.84 in addition to actual traveling expenses at the Primary Election and the same at the General Election. The Federal Law prohibits the expenditure of more than \$5,000 at the General Election but such does not include the expenditures excluded under Subsection (c) of Section 248 Title 2, U.S.C.A.

When we receive the information from the St. Louis County

Honorable Frank M. Karsten

Board of Election Commissioners regarding the exact vote in that part of Florissant Township in the First Congressional District, we will give you the exact expenditure that can be made under the State statute.

I trust this information will be of assistance to you.

Very truly yours,

NORMAN H. ANDERSON  
Attorney General

CBB:cw

June 15, 1966



Honorable Eugene F. Mazzuca  
Representative, 2nd District  
City of St. Louis  
6215 Victoria Avenue  
St. Louis, Missouri

Dear Representative Mazzuca:

This letter is in response to your request for an opinion dated May 20, 1966, relating to a candidate for state representative who has filed for the 67th District, whereas you state the candidate actually resides in the 69th District. This inquiry really involves the question of whether such a candidate is eligible to become a representative as provided by Article III, Section 4, of the Constitution, which provides:

"Each representative shall be twenty-four years of age, and next before the day of his election shall have been a qualified voter for two years and a resident of the county or district which he is chosen to represent for one year, if such county or district shall have been so long established, and if not, then of the county or district from which the same shall have been taken."

The Constitution, however, further provides in Article III, Section 18, as follows:

"Each house shall appoint its own officers; shall be sole judge of the qualifications, election and returns of its own members; \* \* \*"

Under this provision of the Constitution the power to determine the eligibility of a person to hold the office of state representative is vested solely in the House of Representatives and



Honorable Eugene F. Mazzuca

can not be determined either by the Courts, the Executive Branch of the Government or by administrative officers.

We are not unmindful of the case of Mansur vs. Morris, 196 S.W. 2d 287, in which, among other things, it considers the application of Section 120.440 RSMo 1959. Mansur involved the eligibility of a candidate for Magistrate under the Constitution. It did not involve a candidate for State Representative. The opinion makes no reference whatever nor considers Section 18, Article III of the Constitution. We therefore conclude that the Board of Election Commissioners nor this office has authority to rule that a candidate for State Representative may be ineligible to hold the office if elected. We enclose herewith a copy of an opinion of a former Attorney General dated May 13, 1954, to Michael J. Doherty which rules this question.

Yours very truly,

NORMAN H. ANDERSON  
Attorney General

Enclosure

PREVAILING WAGE LAW:  
SOIL AND WATER CONSERVATION DISTRICTS:  
POLITICAL SUBDIVISIONS:

Soil and water conservation districts created pursuant to Section 278.060 et. seq. RSMo, Cum. Supp. 1965, are contemplated by and considered as "public bodies" under the provisions of Section 290.210 (6) Cum. Supp. 1965, and are subject to the provisions of the prevailing wage law.

OPINION NO. 327

July 28, 1966

Honorable James J. Butler, Chairman  
Industrial Commission of Missouri  
State Office Building  
P. O. Box 599  
Jefferson City, Missouri



Dear Mr. Butler:

This is in response to your request for an opinion of this office on the question whether or not soil conservation districts created pursuant to Section 278.060 to 278.155 RSMo, Cum. Supp. 1965, are contemplated by and considered as "public bodies" under the provisions of Section 290.210 (6) RSMo, Cum. Supp. 1965.

Section 290.210 RSMo Cum. Supp. 1965, is a part of the prevailing wage law of Missouri. Subsection (6) thereof states, "'Public body' means the state of Missouri or any officer, board or commission of the state, or other political subdivision;" Subsection (7), defining "public works" excludes "\* \* \* any work done for or by any drainage or levee district;"

A political subdivision embraces a certain territory and its inhabitants organized for public advantage and not in the interest of particular individuals or classifications and its chief design is the exercise of governmental functions and to the electors residing within each subdivision is, to some extent, committed the power of local government to be wielded within their territory for the peculiar benefit for the people there residing. Ark. State Highway Commission v. Clayton, 226 Ark. 772, 792 S.W.2d 77, 79.

Section 278.100 RSMo, Cum. Supp. 1965, provides for the estab-

Honorable James J. Butler

lishment of a soil and water conservation district in a county or in a specified township or townships, pursuant to a petition of land representatives and a vote of the "majority of all land representatives voting" in a referendum. Section 278.110 RSMo provides for a governing board of soil and water district supervisors, composed of the county agricultural extension agent and four land representatives elected by the farmers and their representatives.

Section 278.120 RSMo provides that such a district shall be a body corporate with powers and duties involving soil and water conservation, with authority to cooperate with governmental and other agencies and to accept grants, gifts and contributions from the United States Government and to use and expend them in accordance with the policies of the State soil and water district commission.

In Morrison v. Morey, Mo., 48 S.W. 629, the Supreme Court, holding that a levee district constitutes a political subdivision of the State, said l. c. 633:

" \* \* \* It is manifest that the levee district is not a private corporation. A private corporation is an aggregation of individuals, who have voluntarily associated themselves together. Here the levee district is constituted by the county court laying out the district, and a majority vote of the landowners in the district may order the work to be done. While the law requires a notice to be given of intention to apply to the county court for the formation of the district, it leaves the power to form the district in the court. The landowners can defeat the whole scheme by refusing, by a majority vote, to order the work done; and thus nullify the action of the county court in forming the district. Still the minority are drawn into it involuntarily, and this could not be done if it was a private corporation. It is a public, political subdivision of the state, which the state has the power to create, under its police powers, and as such subdivision it exercises the prescribed functions of government in the district. People v. Reclamation Dist., 53 Cal. 346; Hoke v. Perdue, 62 Cal. 545; Elmore v. Commissioners, 135 Ill. 269, 25 N.E. 1010; State v. Stewart, 74 Wis. 620, 43 N.W. 947; Nugent v. Commissioners, 58 Miss. 197; Commissioners v. Griffin, 134 Ill. 330, 25 N. E. 995; Dean v. Davis, 51 Cal. 406. \* \* \* "

Similarly, a soil conservation district is constituted by the

Honorable James J. Butler

State Soil and Water District Commission (278.110 RSMo Cum. Supp. 1965). If the majority approve the creation of the soil conservation district, "the minority are drawn into it involuntarily." Also see opinion of the Attorney General No. 33, dated January 23, 1958, to Honorable William E. Gladden, copy enclosed, holding that the prevailing wage law applies to incorporated municipalities and school districts.

Thus, all the elements of the above definition of a political subdivision are included in a soil and water district.

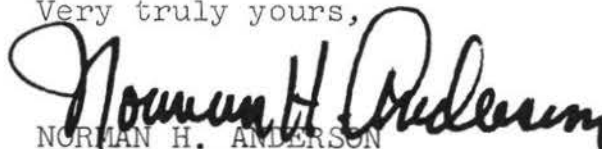
It is clear that under the prevailing wage law all entities fitting the above definition are "public bodies." Drainage and levee districts also come within the scope of the classification "public bodies." It is only by virtue of subsection (7) of Section 290.210, supra, that drainage and levee districts are excluded from the operation of the prevailing wage law. They are excluded, even though they are "public bodies," by virtue of the express exception contained in subsection (7).

#### CONCLUSION

Therefore, it is the opinion of this office that soil and water conservation districts created pursuant to Section 278.060 et. seq. RSMo, Cum. Supp. 1965, are contemplated by and considered as "public bodies" under the provisions of Section 290.210 (6) Cum. Supp. 1965, and are subject to the provisions of the prevailing wage law.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Donald L. Randolph.

Very truly yours,

  
NORMAN H. ANDERSON  
Attorney General

Enclosure

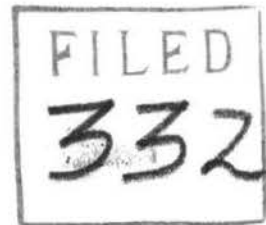
DRIVERS LICENSE:  
DRIVERS LICENSE REVOCATION:  
DRIVING WHILE INTOXICATED:  
HARDSHIP DRIVING PRIVILEGES:  
MOTOR VEHICLES:

Upon proper showing, limited driving privileges may be granted pursuant to Section 302.309, RSMo Supp. 1965, to one whose license has been revoked for failure to submit to a chemical breath test as provided by Section 564.444, RSMo Supp. 1965.

November 3, 1966

OPINION NO. 332

Honorable Lawrence J. Lee  
Prosecuting Attorney  
City of St. Louis  
Municipal Courts Building  
14th and Market Streets  
St. Louis, Missouri 63103



Dear Mr. Lee:

This is in answer to your request for an opinion of this office as to whether limited driving privileges may be granted to one whose license has been suspended for refusal to submit to a chemical breath test.

Sections 564.441-564.444, RSMo Supp. 1965, sometimes referred to as the "Implied Consent Law", enacted in 1965, provide that any person who operates a motor vehicle upon the highways of this state shall be deemed to have given his consent to a chemical breath test for the purpose of determining the alcoholic content of his blood, if arrested for any offense arising out of acts which the arresting officer had reasonable grounds to believe were committed while the person was driving a motor vehicle while intoxicated. Section 564.444.

If the accused submits to the test, the results obtained may be used in evidence in a prosecution for drunken driving, subject to the presumptions of intoxication prescribed in Section 564.442.

If one requested to take the test refuses, no test is given. However, the Director of Revenue is required to revoke the license of such a person for a period of not more than one year. Section 564.444. The Act contains no provisions for granting hardship or limited driving privileges to one who loses his license for refusal to submit to the test.

The primary authority empowering the courts to grant such hardship driving privileges is contained in paragraph 3 of Section 302.309, RSMo Supp. 1965, as follows:

Honorable Lawrence J. Lee

"3. (1) All circuit courts and magistrate courts located in counties which are a part of a multi-county judicial circuit shall have jurisdiction to hear applications for hardship driving privileges.

"(2) When any court of record having jurisdiction finds that a chauffeur or operator is required to operate a motor vehicle in connection with his business, occupation or employment, the court may grant such limited driving privilege as the circumstances of the case justify if the court also finds undue hardship on the individual in earning a livelihood, and while so operating a motor vehicle within the restrictions and limitations of the court order the driver shall not be guilty of operating a motor vehicle without a valid driver's license.

"(3) An operator or chauffeur may make application to the proper court in the county in which the operator or chauffeur resides or in the county in which is located his principal place of business or employment. Any application for a hardship driving privilege shall be accompanied by a copy of the applicant's driving record for the next preceding five years as certified by the director and proof of financial responsibility as required by chapter 303, RSMo.

"(4) The court order granting the hardship driving privilege shall indicate the termination date of the order, which shall be not later than the end of the period of suspension or revocation. A copy of the order shall be sent by the clerk of the court to the director, and a copy shall be given to the driver which shall be carried by him whenever he operates a motor vehicle. A conviction which results in the assessment of points under the provisions of section 302.302, other than a violation of a municipal stop sign ordinance where no accident is involved, against a driver who is operating a vehicle under the authority of a court order terminates the order, and the court in which the conviction occurs shall immediately so notify the driver, the director and the court which granted the order.



Honorable Lawrence J. Lee

"(5) This subsection does not apply to any person whose license has been suspended or revoked:

(a) For any reason which would have disqualified him or made him ineligible for a license under section 302.060, or to any person whose license has been revoked by reason of an unsatisfied judgment against him or whose license has been revoked for failure to comply with the safety responsibility law, or

(b) Because of operating a motor vehicle while intoxicated, except as provided in section 564.440, RSMo, or under the influence of narcotic drugs or who has been convicted of any felony in the commission of which a motor vehicle was used. In no case shall limited driving privileges be granted to a person on the basis of undue hardship more than one time within a period of five years."

Although Section 302.309 is a part of Chapter 302 which, among other things, provides for the suspension and revocation of the drivers license of habitual traffic violators, the provisions of paragraph 3 are not specifically limited to the deprivation of a license under this Chapter. Nothing in the language of subparagraphs (1)-(4) of this paragraph in any way limits its application to suspensions or revocations under the point-system, but appears to apply to anyone whose license has been suspended or revoked.

The only limitations are those provided in subparagraph (5) which states that the privilege shall not be granted to any person whose license has been suspended or revoked under circumstances set out therein.

The fact that several of the limitations in subparagraph (5) refer to persons whose license has been suspended or revoked for offenses set out in chapters other than 302; i.e., for failure to comply with the safety responsibility law - Chapter 303, and because of operating a motor vehicle while intoxicated - Section 564.440 indicates the legislative intent that the privileges authorized by this section apply in all circumstances in which a person has had his license suspended or revoked, except as provided in subparagraph (5) and are not limited only to the provisions of Chapter 302.

It should be noted that paragraphs 1 and 2 of Section 302.309 read in part as follows:

Honorable Lawrence J. Lee

"1. Whenever any operator's or chauffeur's license is suspended under sections 302.302-302.309 \* \* \*.

"2. Any operator or chauffeur whose license is revoked under these sections, \* \* \*."

The specific limitation of these paragraphs to the sections indicated, coupled with the absence of any such limitation in paragraph 3, furnishes a further indication that the legislature did not desire that the hardship privileges authorized therein be restricted to those whose license was suspended or revoked under the provisions of Chapter 302.

The only other authority for granting limited driving privileges is contained in Section 564.440, RSMo, which is limited to the suspension or revocation of the license of one convicted of driving while intoxicated. Since the purpose of enacting statutes requiring one to submit to an intoxication test or lose his license is to clear our highways of those who drink and drive, it would not be reasonable to assume that the legislature intended to allow limited driving privileges to be granted those actually convicted of driving while intoxicated but withhold this privilege from those who had only refused to submit to a test to determine whether or not they were intoxicated.

It is, therefore, our opinion that limited driving privileges may be granted to one whose license was revoked under Section 564.444 for failure to submit to the Missouri "breathalyzer" test. Of course, this privilege may not be granted except upon compliance with all of the requirements of Section 302.309-3, especially those regarding proof of financial responsibility as required by subparagraph (3).

#### CONCLUSION

Upon proper showing, limited driving privileges may be granted pursuant to Section 302.309, RSMo Supp. 1965, to one whose license has been revoked for failure to submit to a chemical breath test as provided by Section 564.444, RSMo Supp. 1965.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John H. Denman,

Very truly yours,



NORMAN H. ANDERSON  
Attorney General

COMPATIBILITY OF OFFICES: (1) There is no automatic forfeiture of  
CONFLICT OF INTEREST: office by an incumbent county superintendent  
OFFICERS: of schools who assumes the additional but  
COUNTY CLERKS: compatible office of county clerk, such of-  
COUNTY SUPERINTENDENTS ficer is entitled to statutory compensation  
OF SCHOOLS: during the term of his office as county  
superintendent of schools. (2) The employees  
of such office are entitled to their regular  
compensation for services rendered during the  
term of office of their superior as county  
superintendent of schools.

OPINION NO. 337

November 23, 1966

Honorable Haskell Holman  
State Auditor  
Jefferson City, Missouri



Dear Mr. Holman:

This is in answer to your request for an opinion of this office on the questions which you have stated as follows:

"1. When an individual serving in the official capacity as Superintendent of Schools was duly elected to, qualified for and assumed the office of clerk of the county court on January 1, 1963, does the office of superintendent of schools become vacant on January 1, 1963 even though there is no record found of the individual resigning from the office of superintendent of schools?

2. Would the then Clerk of the County Court be entitled, subsequent to January 1, 1963 and until his successor in office as superintendent of schools was elected or appointed and who assumed office on the first Monday in July 1963, to any compensation as set forth in Sections 167.065, 167.067, 167.200, 167.210 and 167.220 RSMo 1959 for that of superintendent of schools?

3. Would it be permissible for an individual to serve in the capacity of and receive compensation therefor, from state or county funds, as clerical assistant for the superintendent of schools during the period in question, that being January 1 to the first Monday in July 1963?"

Honorable Haskell Holman

A vacancy occurs in a public office whenever it is unoccupied by a legally qualified incumbent who has a lawful right to continue therein until the happening of some future event. In *State ex inf. McKittrick v. Wilson*, Mo., 166 S.W.2d 499, 502, the court said:

"\* \* \* It means empty, unoccupied, as applied to an office without an incumbent; an existing office without an incumbent is vacant. An incumbent of an office is one who is legally authorized to discharge the duties of that office. *State ex rel. Sanders v. Blakemore*, 104 Mo. 340, 15 S.W. 960 \* \* \*"

A person who holds two compatible offices simultaneously is entitled to the statutory compensation for each office. *State ex rel. Zevely v. Hackmann*, 300 Mo. 59, 254 S.W. 53; *Bruce v. City of St. Louis*, Mo. App., 217 S.W.2d 744; *Coleman v. Kansas City*, 351 Mo. 254, 173 S.W.2d 572; *State ex rel. Koehler v. Bulger*, 289 Mo. 441, 233 S.W. 486; *United States v. Saunders*, 120 U.S. 126, 7 S.Ct. 467, 30 L.Ed. 594. This is true unless a statute, the common law or the Constitution forbids the holding of such offices by the same person. *State ex rel. Walker v. Bus*, Mo., 36 S.W. 636, 637.

Therefore, the office of Superintendent of Schools would not become vacant upon the acceptance by the incumbent of the office of Clerk of the County Court on January 1, 1963, unless those two offices are incompatible at common law or pursuant to some constitutional or statutory provision. There is no such provision in the Constitution or statutes of Missouri with respect to the offices of County Superintendent of Schools and Clerk of the County Court.

The question remains whether the two offices are intrinsically incompatible so as to be held incompatible at the common law. Two offices are incompatible at common law when (a) one is subordinate to the other, (b) one has supervisory power over the other, (c) one has power of appointment or power of removal over the other, or (d) one audits the other's accounts. 67 C.J.S., *Offices*, Section 23, page 135; *State v. Wittmer*, Mont. 144 Pac. 648, 649; Opinion 167, issued April 19, 1963, to Daniel V. O'Brien (copy enclosed).

The County Superintendent of Schools has supervision over the schools of his county (Section 179.040, RSMo Cum. Supp. 1965). He is the school attendance officer (Section 167.070, RSMo Cum. Supp. 1965). He attends various meetings (Sections 179.050 and 165.657, RSMo Cum. Supp. 1965), and makes certain reports (Sections 179.080 and 179.090, RSMo Cum. Supp. 1965) in connection with schools and education, as well as other duties, such as the issuance of work certificates for minors (Section 294.045, RSMo).



Honorable Haskell Holman

The County Clerk is the clerk of the County Court, charged with keeping records and accounts of county business, issuing, attesting and affixing his seal to certain documents, accounting for certain moneys, and other duties with respect to the business of the county government, pursuant to the provisions of numerous statutes.

There are only two areas of impingement of the office of County Superintendent and that of County Clerk. It is the duty of the County Superintendent, pursuant to Section 179.040, RSMo Cum. Supp. 1965, to turn over to the County Clerk estimates and enumeration lists. Under Section 51.150, RSMo Cum. Supp. 1965, the County Clerk keeps accounts with all persons, including the County Superintendent, who may be entitled to receive money from the county and keeps lists of salaries, fees and expenses paid by the county. In connection with the duties set out in said Sections 179.040 and 51.150, no authority is conferred upon the County Clerk to verify, challenge or disapprove reports by or disbursements to the County Superintendent. Said statutes do not make one office subordinate to the other, give one supervisory power of appointment or removal over the other or constitute an audit of one's accounts by the other. The offices are not incompatible.

The individual in question was entitled to all compensation payable to the office until the first Monday in July, 1963, when his successor assumed the office of Superintendent of Schools. The Supreme Court said, *Coleman v. Kansas City, Mo.*, 173 S.W.2d 572, 577:

"During the time Murray held the office, he is entitled to the salary fixed by law as an incident to that office. 'Compensation to a public officer is a matter of statute, not of contract; and it does not depend upon the amount or value of services performed, but is incidental to the office.' *State ex rel. Evans v. Gordon*, 245 Mo. 12, loc. cit. 27, 149 S.W. 638, loc. cit. 741.  
\* \* \*"

Anyone duly appointed by the Superintendent of Schools as a clerical assistant would be entitled to compensation for services performed in that capacity. The fact that the Superintendent of Schools was also the Clerk of the County Court during the period January 1 to the first Monday in July, 1963, does not affect such person's status or rights.

#### CONCLUSION

It is the opinion of this office that, since there is no automatic forfeiture of office by an incumbent county superintendent of

Honorable Haskell Holman

schools who assumes the additional but compatible office of county clerk such officer is entitled to statutory compensation during the term of his office as county superintendent of schools and his employees are entitled to their regular compensation for services rendered during the term of office of their superior as county superintendent of schools.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Donald L. Randolph.

Very truly yours,



NORMAN H. ANDERSON  
Attorney General

Enclosure: Opinion No. 167



CORPORATIONS: Any corporation offering engineering  
ENGINEERS: services to the public must do so  
PROFESSIONAL ENGINEERS: through the medium of a registered  
professional engineer. A company or  
corporation may not use the word engineer in its name to in-  
dicate to the public that it may provide professional engineer-  
ing services unless there is a registered professional engineer  
employed by the company.

Violation of these rules constitutes a misdemeanor under  
Section 327.280, RSMo.

December 13, 1966

OPINION NO. 339

Honorable Jerome F. Waterman  
First Assistant Prosecuting Attorney  
Jackson County  
415 East 12th Street  
Kansas City, Missouri



Dear Mr. Waterman:

This is in answer to your request for an opinion of this  
office regarding the legality of using or advertising the term  
"engineer" in a firm or corporation which does not employ a  
registered professional engineer. Specifically, the two ques-  
tions asked are as follows:

"No. 1) Can a corporation use the word  
'engineer' in its corporation name when  
there are no registered professional  
engineers in the corporation's employ?

"No. 2) Need a corporation, offering  
engineering services to the public, have  
registered professional engineers in its  
employ?"

The corporate practice of engineering is authorized by  
Section 327.080, RSMo, and Chapter 356, RSMo Supp. 1965. Para-  
graph 1 of Section 327.080 provides that any registered profes-  
sional engineer may practice his profession through the medium  
of, or as a member or an employee of a partnership or corpora-  
tion. This and the succeeding paragraphs provide that a corpor-  
ation may solicit, offer and render engineering services only

Honorable Jerome F. Waterman

by placing the responsibility for the proper conduct of such services on the registered professional engineer or engineers.

Chapter 356 entitled "The Professional Corporation Law of Missouri" provides the means for the rendering of certain professional services including that of engineering through a corporate structure. In order to incorporate under this chapter, the incorporators must be licensed to provide the particular professional service that will be offered by the corporation, and the stockholders and officers (other than secretary) and directors of the corporation when formed must also be so licensed. Sections 356.040, 356.070 and 356.080, RSMo Cum. Supp.

Thus, in answer to your second question, any corporation offering engineering services to the public must do so through a registered professional engineer. If the corporation is incorporated under Chapter 356, RSMo Supp. 1965, it must comply with the more stringent requirements of this chapter.

Regarding your first question, the use of the title "professional engineer" or "engineer" is governed by Section 327.280, which provides in part as follows:

"1. After the taking effect of this law, any person who shall practice, or offer to practice, the professions of architecture or professional engineering in this state, or any person who shall use the title 'architect' or 'designer' or 'draftsman' as indicating professional architectural service as in this chapter defined, or 'professional engineer' or 'consulting engineer', or 'engineer' as indicating professional engineering service as in this chapter defined, with or without qualifying adjectives, or who shall use any other words, letters or figures indicating or intending to imply that the person using the same is an architect or professional engineer, without being registered or exempted in accordance with the provisions of this chapter, \* \* \* shall be guilty of a misdemeanor, and shall be punished upon conviction by a fine of not less than one hundred dollars nor more than five hundred dollars, or by imprisonment in the county jail for a term not exceeding three months, or both."

This statute makes it a misdemeanor for any person not registered as a professional engineer to practice or offer to practice engineering, to use the term engineer to indicate the

Honorable Jerome F. Waterman

service he purveys is a professional engineering service or to use any word or words to indicate he is a professional engineer. The word "person" as used in this section includes not only individuals but also applies to corporations and to partnerships and other unincorporated associations. Section 1.020-(7), RSMo.

The key words in the statute are: "any person [firm or corporation] who shall use the title 'engineer' as indicating professional engineering service as in this chapter defined, \* \* \* or who shall use other words \* \* \* indicating or intending to imply that the person using the same is a \* \* \* professional engineer \* \* \*." Thus, the use of the title "engineer" is illegal only when the person or firm purports or represents himself as qualified to perform professional engineering services as defined in Section 327.020, RSMo.

There are several instances when the title "engineer" is used that would never indicate to the general public that the person is able to perform professional engineering services; i.e. train engineer or flight engineer. In other circumstances the use of the title "maintenance engineer" by a janitor, "sales engineer" by a salesman, or "carpet engineer" by a person who sells or cleans carpets, would not indicate to the ordinary reasonable man that the person is qualified to perform professional engineering services or that the service he purveys is an engineering service as defined in Section 327.020.

On the other hand, there are certain professions which, although not within the ambit of professional engineering services as defined by Section 327.020 are so closely allied to such services that the mere use of the title "engineer" would indicate that the services required a registered engineer and the person using the title was so qualified and registered. An example of this situation could be that of a radio or television repairman who would use the title "electrical engineer" or "television engineer". In this case, the use of such a title could easily be held to be a misdemeanor as a violation of Section 327.280.

Thus, in answer to your first question the legality of a corporation or firm which does not employ a registered engineer using the title "engineer" in its name is determined by whether the use of the term indicates that the company may provide professional engineering services through a professional engineer. Following our previous reasoning the nature of some businesses is such that the use of the title "engineer" in the firm name is sufficient to mislead the public. In other cases the use of the title may not in itself be misleading but subsequent representations by the firm or its employs might constitute an unlawful representation. The basic test is whether the use of the

Honorable Jerome F. Waterman

title in the firm name constitutes an implication that the company may provide professional engineering services as defined in Section 327.020 which would require them to do so through a professional engineer. Whether the use of the title in a particular firm name constitutes a misdemeanor must be adjudged under the facts in each individual case using the principles expressed herein.


#### CONCLUSION

It is the opinion of this office that any corporation offering engineering services to the public must do so through the medium of a registered professional engineer. A company or corporation may not use the word engineer in its name to indicate to the public that it may provide professional engineering services unless there is a registered professional engineer employed by the company.

Violation of these rules constitutes a misdemeanor under Section 327.280, RSMo.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John H. Denman.

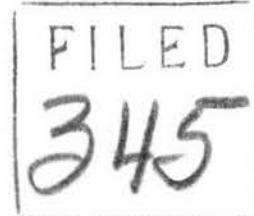
Very truly yours,

  
NORMAN H. ANDERSON  
Attorney General

ELECTIONS:  
PRIMARIES:  
POLLING PLACES:  
DAYLIGHT SAVING TIME:  
STANDARD TIME:

Rules for Opening and Closing  
Polls for August 2, 1966  
Primary Election

July 1, 1966



OPINION NO. 345

Honorable James C. Kirkpatrick  
Secretary of State  
Capitol Building  
Jefferson City, Missouri

Dear Mr. Kirkpatrick:

This opinion is in response to your request relating to the proper time for opening and closing of polling places at the August 1966 Primary Election. The problem arises because of the adoption of daylight saving time in many towns and cities and the observance of daylight saving time in adjacent rural areas. Essentially this presents three problems:

1. During what hours should the polls be open in those counties where all of the towns and cities observe daylight saving time.
2. During what hours should the polls be open where some of the towns and cities in the county observe daylight saving time, and others observe standard time.
3. During what hours should the polls be open in voting districts where part of the voting district observes daylight time and part of such voting district observes standard time. This situation arises in instances where a voting district overlaps city or town limits when the town observes daylight time and the surrounding county observes standard time.

Honorable James C. Kirkpatrick

Section 111.370, RSMo Cum. Supp. 1965 provides:

"The judges of each election hereafter to be held, general or municipal, shall open the polls at six o'clock in the morning and continue them open until seven o'clock in the evening, unless the sun shall set after seven o'clock, when the polls shall be kept open until sunset, except in first class counties having a charter form of government and in counties of the second class containing all or part of a city over four hundred thousand and in cities in the state of twenty-five thousand inhabitants or upward, when the polls shall be opened at six o'clock in the morning and be kept open until seven in the evening."

The only First Class County having a charter form of government is St. Louis County. The only Second Class County containing all or part of a city over 400,000 is Clay County.

It is apparent that the Legislature in the enactment of the foregoing statute did not take into account the possible observance in some parts of Missouri of daylight saving time. It is also important that the polls remain open during all the time necessary within the meaning of the statute to permit qualified voters to vote, so that no qualified voter will be denied his right to vote. *Davenport vs. Teeters*, Mo. App. 273 S.W. 2d 506.

During World War II by Federal Statute, daylight saving time was adopted. A problem similar to the one here presented was ruled on by this office in an Opinion dated March 17, 1942, to Dwight H. Brown. This office then concluded:

"It is therefore the opinion of this department that in all elections the closing of the polls is governed by Day-light Savings Time, commonly referred to as 'War Time', and that in those elections within the purview of sec. 11487 R.S. Mo., 1939, the polls should be kept open until seven (7) o'clock in the evening (Daylight Savings Time) unless the sun shall set thereafter, then until sunset."



Honorable James C. Kirkpatrick

In many counties in Missouri many towns and cities have either formally or informally adopted daylight saving time with the result that practically everyone in the county observes daylight saving time. In this situation we believe that the prevailing time observed in the county is daylight saving time and should govern the problem of opening and closing of the polls.

In a few counties in Missouri the situation exists where some of the towns and cities have adopted daylight saving time while others continue to observe standard time. It appears to us that the logical rule applicable here would be to determine the prevailing time observed at the place where the polls are located which should govern. In other words if the place where the polls are located observes daylight saving time then the rules concerning daylight saving time should be applied. If the place where the polls are located observes standard time then the rules respecting the application of standard time should be observed. This leads then to the application of Section 111.370 respecting the opening and closing of the polls.

#### CONCLUSION

This office concludes that the following recommendations should be made so that maximum opportunity of voters to vote in the August 1966 Primary Election will be afforded:

1. In those counties and cities falling within the exception provision of Section 111.370, RSMo Supp. 1965, to wit: St. Louis County, Clay County and cities of 25,000 inhabitants or more, the polls should be open at Six o'clock in the morning and remain open until Seven O'Clock PM prevailing time in the county or city as the case may be.
2. In counties, not governed by the above exception, where daylight saving time is the prevailing time the polls should be opened at Six o'clock (daylight saving time) in the morning and close at sunset.
3. In counties, not governed by the above exception, where daylight saving time prevails in one town and standard time prevails in another town, then the prevailing time

Honorable James C. Kirkpatrick

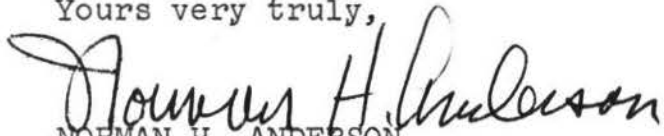
should be observed for opening the polls but the polls should close at sunset.

4. In counties, not governed by the above exception, where standard time is observed the polls should open at Six o'clock standard time and close at sunset.

5. In counties, not governed by the above exception, where part of the precinct is in an area which observes standard time and part of the precinct is in an area which observes daylight saving time, then the polls should be open at Six o'clock AM daylight saving time and close at sunset.

The foregoing opinion, which I hereby approve, was prepared by my Assistant J. Gordon Siddens.

Yours very truly,

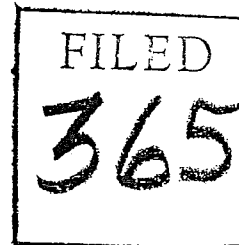
  
NORMAN H. ANDERSON  
Attorney General

POLITICAL SUBDIVISIONS:  
PUBLIC WATER SUPPLY DISTRICTS:  
TAXATION:  
    EXEMPTIONS  
    SALES TAX

The 1965 Amendments to Chapter 144 do not relieve a public water district formed under the provisions of Section 247.010 et seq. RSMo 1959 from collecting sales tax from domestic, commercial or industrial consumers to whom it sells water and remitting the same to the Department of Revenue.

OPINION NO. 365

October 26, 1967



Honorable Paul McGhee  
Prosecuting Attorney  
Stoddard County  
16 North Elm Street  
Dexter, Missouri 63841

Dear Mr. McGhee:

This is in answer to your request for an opinion of this office which reads as follows:

"I respectfully request your official opinion as to whether a public water supply district organized under the provisions of Sections 247.010 et seq. RSMo 1959 must collect sales tax from the persons to whom it sells water within its district, and remit the same to the State."

Section 39 of Article III of the Missouri Constitution, 1945, provides:

"The general assembly shall not have power:

\* \* \* \* \*

(10) To impose a use or sales tax upon the use, purchase or acquisition of property paid for out of the funds of any county or other political subdivision."

This office in Opinion No. 109 written to the Honorable Don R. Ferry, Prosecuting Attorney for Vernon County on April 25, 1967, held, that the proper definition of the term "other political subdivision" as used above is found in Section 15, Article X of the Missouri

Honorable Paul McGhee

Constitution, and includes public water supply districts formed under the provisions of Sections 247.010 through 247.220, RSMo 1959, as amended.

Section 144.020-1(3), RSMo Supp. 1965, imposes upon all sellers for the privilege of engaging in the business of selling tangible personal property or rendering taxable services at retail in this state "A tax equivalent to three per cent of amounts paid or charged on all sales of electricity or electric current, water and gas, natural or artificial, to domestic, commercial or industrial consumers."

Prior to 1965, in an opinion written on October 29, 1946, to the Honorable E. F. Bertram, Representative of Scotland County, this office held that the constitutional prohibition did not forbid collection of tax on sales of electrical current and water by a municipally owned light and water plant because the taxes were paid by the consumer, and the plant merely acted as the agent or conduit through which the state sought to facilitate the accounting for and the collection of the tax from the purchaser of light and water who is the taxpayer.

However as a result of the decision of Automagic Vendors, Inc. v. Morris, Mo.Banc., 386 S.W.2d 897, and Automatic Retailers of America, Inc., v. Morris, Mo.Banc., 386 S.W.2d 901, Chapter 144 was amended changing it from a "sales" tax to a "gross receipts" tax. The tax is no longer imposed upon the buyer, but upon the seller for the privilege of engaging in business. Sections 144.020, 144.021 and 144.080, RSMo Supp. 1965. But in our opinion this change does not relieve a political subdivision from the duty of collecting and paying the tax.

It is clear that the provisions of Chapter 144, as amended, are still applicable to sales by a public water supply district. The tax still is imposed upon all "persons" engaged in selling water to domestic, commercial or industrial consumers. Section 144.020-1(3), RSMo Supp. 1965. No change was made in Section 144.010-1(5) which includes political subdivisions within the definition of the word "persons". Although the tax is now imposed upon the seller based upon his gross receipts the seller still is required to collect and the buyer to pay the tax under the bracket provisions of Section 144.285, RSMo Supp. 1965.

Nor do we think the obvious legislative intent to include political subdivisions within the requirements of Chapter 144 is frustrated by the constitutional prohibition. There is no "use purchase or acquisition of property" by the water supply district in this case, and since the incidence of the tax falls upon the consumer, the taxes are not "paid for out of the funds of any \* \* \* political subdivision".

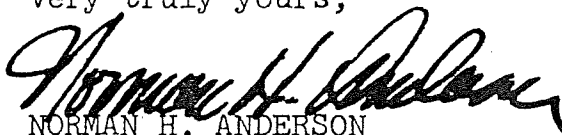
Honorable Paul McGhee

CONCLUSION

The 1965 Amendments to Chapter 144 do not relieve a public water district formed under the provisions of Section 247.010 et seq. RSMo 1959 from collecting sales tax from domestic, commercial or industrial consumers to whom it sells water and remitting the same to the Department of Revenue.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John H. Denman.

Very truly yours,



NORMAN H. ANDERSON  
Attorney General

Enclosures - Opinion No. 109  
4/25/67 - Ferry

Opinion No. 7  
10/29/46 - Bertram

August 26, 1966

OPINION NO. 348  
Answered by letter-Nowotny

Honorable Thomas C. Gilstrap  
Collector of Revenue  
State of Missouri  
Jefferson Building  
Jefferson City, Missouri 65102



Dear Mr. Gilstrap:

This is in answer to your request for an opinion which request reads as follows:

"We received a letter from Mr. Everett Griffin, Fair Play, Missouri, requesting a refund of his Itinerant Vendor's Special Deposit in the amount of \$500.00.

"Mr. Griffin was first issued an Itinerant Vendor's License on July 10th, 1956 which was in the amount of \$25.00 and was for the period of one year. At the same time we also received his \$500.00 cash bond which has been carried in a custody account, and is returned to the vendor sixty days after the license has been cancelled. Mr. Griffin renewed his license each year, the last being on July 10th, 1959. However, we have not heard from him since that time until last month. Mr. A. S. Arenson, former Collector of Revenue, tried on numerous occasions to locate Mr. Griffin, but without success.

"We wrote Mr. Griffin under date of March 30th requesting him to send us his Itinerant Vendor's License in letter form, dated July 10th, 1956, and also his Receipts for the cash bond and \$25.00 license fee which must be sent to us before any action can be taken in regard to the refund. However, Mr. Griffin has advised me that he is unable to locate this license or his Receipts.

"We will be guided by your opinion in this matter."



Honorable Thomas C. Gilstrap

An itinerant vendor in Missouri must obtain a state license as provided for by Section 150.390, RSMo 1959. This section reads in part as follows:

"2. Every itinerant vendor desiring to do business in this state shall deposit with the state collector of revenue the sum of five hundred dollars as a special deposit, and thereafter, upon application in proper form, and the payment of a further sum of twenty-five dollars, as a state license fee, such state collector of revenue shall issue to him an itinerant vendor's license, authorizing him to do business in this state, in conformity with the provisions of sections 150.380 to 150.460, for one year from the date thereof."

The purpose of the deposit is to satisfy claims of creditors of the licensee and to pay any fines and penalties incurred by the licensee. Section 150.440, RSMo 1959 reads as follows:

"Each deposit so made with the state collector of revenue, shall be subject to attachment and execution on behalf of creditors, whose claims arise in connection with business done in this state, and to the payment of fines and penalties incurred by the licensee, through violation of sections 150.380 to 150.460. Claims under civil process shall be enforced against the state collector of revenue as garnishee, or trustee by action in the usual form, and claims for satisfaction of fines and penalties shall be enforced by the prosecuting attorney serving notice of pendency of action and judgment when obtained upon the state collector of revenue. Claims upon each deposit shall be satisfied after judgment, in the order in which notice of the claim is received by the state collector of revenue, until such claims are satisfied, or the deposit exhausted; but notices filed after the expiration of such sixty days' limit shall not be valid. A deposit shall not be paid by the state collector of revenue to licensees as long as there are outstanding claims or notices of claims against it, unless there is unreasonable delay in enforcing them."

Section 150.430, RSMo 1959, provides for expiration and surrender of licenses and return of the deposit and reads in part as follows:

"2. All state licenses shall expire by limitation one year from the date thereof, and may be surren-

Honorable Thomas C. Gilstrap

dered at any time prior thereto for cancellation. Upon the expiration and return, or surrender of a state license, the state collector of revenue shall cancel it, indorse the date of delivery and cancellation thereon, and place it on file.

"3. He shall hold the special deposit of such licensee mentioned in sections 150.380 to 150.460, for the further period of sixty days, and after satisfying all claims made under it under section 150.440, shall return such deposits, or portion thereof, as remains in his hands, to the licensee depositing same."

The license issued by the state, then, automatically expires one year from date of issue. However, a license may be cancelled before expiration by surrender of the license. If the license has automatically expired, as happened here, then the license is cancelled upon return of the license.

In either case the special deposit is returned only after a sixty day period starting from the date of cancellation by the state Collector of Revenue.

Cancellation is effected on return of the license to the Collector of Revenue. However, here the license has been lost or destroyed making it physically impossible to return the license. It is our opinion that the licensee is nevertheless entitled to the return of his special deposit.

The Collector of Revenue must insure that the particular person claiming the deposit is entitled to the deposit. The Collector should require proof that the claimant is the same person to whom the license was issued and further should require sworn affidavits that the claimant is physically unable to return the license because it has been lost, stolen or destroyed.

When the Collector of Revenue is adequately assured that the claimant is entitled to the special deposit the license is then considered cancelled and after sixty days the special deposit should be returned.

Very truly yours,

NORMAN H. ANDERSON  
Attorney General

RECORDS:  
STATE RECORDS COMMISSION:  
INSURANCE:

374.070 (3) authorizes Superintendent of Insurance to destroy specified records of all companies after five years.  
374.070 (4) authorizes Superintendent of Insurance to destroy specified records of foreign and alien companies only after ten years. 374.070 (3) and (4) are repealed upon adoption of rules by state records commission.

OPINION NO. 351

November 1, 1966

Honorable James C. Kirkpatrick  
Secretary of State  
State of Missouri  
Jefferson City, Missouri



Dear Mr. Kirkpatrick:

Reference is made to your request for the formal opinion of this office stated in your letter as follows:

"I respectfully request that you advise me, as Chairman of the State Records Commission, if Sec. 374.070, R. S. Mo., 1959, Par. 3 and Par. 4, refers to Domestic as well as Foreign companies."

Section 374.070 (3) provides as follows:

"Five years after the conclusion of the transactions to which they relate, the superintendent is authorized to destroy or otherwise dispose of all correspondence, complaints, claim files, working papers of examinations of companies, examination reports of companies made by the insurance supervisory officials of states other than Missouri, rating files, void or obsolete or superseded rate filings and schedules, individual company rating experience data, applications, requisitions, and requests for licenses, all license cards and records, all expired bonds, all records of hearings, and all similar records, papers, documents, and memoranda now or hereafter in the possession of the superintendent."

Honorable James C. Kirkpatrick

The section is directed to records, papers, documents and memoranda on file in the office of the Superintendent of the Division of Insurance. No specific reference is made to any particular insurance company, and a reading of the statutory provisions in this paragraph indicates that the paragraph applies generally to all documents referred to in the paragraph. None of the statutory language indicates any intention to limit its application to domestic or foreign companies. Therefore, this office concludes that the provisions of Section 374.070 (3) authorize the Superintendent of the Division of Insurance to destroy or otherwise dispose of all records, papers, documents and memoranda referred to in the statutory provision in regard to all companies, domestic and foreign.

Section 374.070 (4) provides as follows:

"Ten years after the conclusion of the transactions to which they relate, the superintendent is authorized to destroy or otherwise dispose of all foreign companies' and alien companies' annual statements, valuation reports, tax reports, and all similar records, papers, documents and memoranda now or hereafter in the possession of the superintendent."

As examination of these statutory provisions reflects a legislative intent to limit the application of such statutory provisions to foreign and alien companies. Such limitation to annual statements is clearly stated. Some question may arise as to whether the limitation applies to valuation reports, tax reports, etc. The specific applicable statutory language states " \* \* \* all foreign companies' and alien companies' annual statements, valuation reports, tax reports, and all similar records \* \* \* ." The subject could have been stated as "annual statements, valuation reports, tax reports, and all similar records of foreign companies and alien companies." It appears to this office that the legislature intended to limit the application of this statutory provision to foreign companies and alien companies.

Conversely, Section 374.074 (4) does not apply to domestic companies. Therefore, the Superintendent is not authorized to destroy annual statements, valuation reports, tax reports, etc., of domestic companies ten years after the conclusion of the transactions to which such records relate. There is no authority in such statute for the Superintendent to destroy such records at the conclusion of any period of time, and thus, it would appear that such documents of domestic companies must be retained indefinitely insofar as such statute

Honorable James C. Kirkpatrick

is concerned.

Your attention is directed to Section 109.310, Cum. Supp. 1965, as follows:

"Records shall be destroyed according to the provisions of existing law and administrative regulations until the state records commission promulgates rules and regulations for the destruction of records. All provisions of law and all administrative rules and regulations for the destruction of records are repealed upon the effective date of the rules and regulations for the destruction of records adopted and promulgated by the commission pursuant to sections 109.200 to 109.310." (Emphasis added)


Under the provisions of the cited statute, Section 374.070 (3) and (4), discussed above, relating to the destruction of records in the Division of Insurance, will be repealed upon the adoption and promulgation of rules and regulations for the destruction of such records by the state records commission.

#### CONCLUSION

Section 374.070 (3), RSMo, is applicable to domestic as well as foreign companies and the records listed in such section of both foreign and domestic insurance companies may, under such statute, be destroyed by the Superintendent of Insurance five years after the conclusion of the transactions to which such records relate. Section 374.070 (4), RSMo, is applicable to foreign companies and alien companies only and under such section, the Superintendent of Insurance is authorized to destroy the records listed in such section only of foreign insurance companies ten years after the conclusion of the transactions to which they relate and he is given no power to destroy such records of domestic insurance companies. Pursuant to Section 109.310, RSMo, the provisions of Section 374.070 (3) and (4) are repealed upon the adoption and promulgation of rules and regulations relating to the same subject matter by the state records commission.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Thomas J. Downey.

Yours very truly,

  
NORMAN H. ANDERSON  
Attorney General



COUNTY CLERKS: Section 165.087, RSMo 1959, was repealed by implication  
FEES: of the statutes placing the office of county clerk on a  
SCHOOLS: salary basis. This section was formally repealed by  
Senate Bill No. 3, 72nd General Assembly, Laws 1963,  
p.200.

OPINION NO. 356

September 1, 1966

Honorable Charles H. Sloan  
Prosecuting Attorney  
Ray County Courthouse  
Richmond, Missouri



Dear Mr. Sloan:

This official opinion is issued in response to your request for an official ruling of this office.

Your question relates to the former statute, Section 165.087, RSMo 1959, which was repealed by Senate Bill 3 of the 72nd General Assembly, effective July 1, 1965. Laws 1963, page 200.

You state that your county clerk has never made an application for compensation under this former statute because he did not know of its existence. You inquire as to whether or not he may now make a claim for any past compensation due him under this Section.

It is unnecessary for us to determine the rights of a public official to compensation which is belatedly claimed, for the reason that Section 165.087, RSMo 1959, was repealed by implication prior to its formal repeal by Senate Bill 3.

Section 165.087, RSMo 1959, provided as follows:

"The county clerk shall receive as full compensation therefor ten cents for every hundred figures in school tax column on general tax book, to be paid by the county treasurer upon warrant issued by the county court."

This statute was enacted in 1909. Laws 1909, page 770.

Formerly, compensation of county clerks was on a fee basis. Presently, and indeed for several years, the basic compensation of county clerks has been on a salary and not a fee basis. We are advised that Ray County is a county of the third class. The basic compensation for clerks of counties of the third class is presently provided on a salary basis by the provisions of Section 51.300, RSMo Supp. 1965.

This office has previously ruled that subsequent to the changing



Honorable Charles H. Sloan

of the basis of compensation of clerks from a fee to a salary, that county clerks were not authorized to retain as compensation statutory fees, unless the statute expressly authorized such retention in addition to the base salary. In Opinion No. 41, issued November 4, 1953, to the Honorable Haskell Holman (copy enclosed) this office ruled:

"In view of the salary basis of compensation,  
. . . the legal presumption of legislative intent is that every fee is to be accounted for and not to be retained by the clerk unless the Legislature clearly states otherwise."

Since the fee in former Section 165.087, was chargeable to the county, in light of the abolishment of the fee method of compensation, this statute had no force and effect.

Section 51.390, RSMo 1959, provides:

"The clerk of the county court, in counties of the third and fourth classes, shall charge and collect in all cases every fee accruing to his office by law, except such fees as are chargeable to the county."

Section 165.087, was repealed by necessary implication by the enactment of the statutes which placed the compensation of county clerks on a salary basis. These facts probably motivated the formal repeal of this Section by the recodification of the school laws by Senate Bill 3.

You do not indicate for how many years in the past the county clerk has filed to claim the compensation under former Section 165.087. However, we assume that all these years are subsequent to those statutes which place the county clerks of third class counties on a salary basis. Therefore, we are of the opinion that your county clerk is not entitled to any past compensation under this Section.

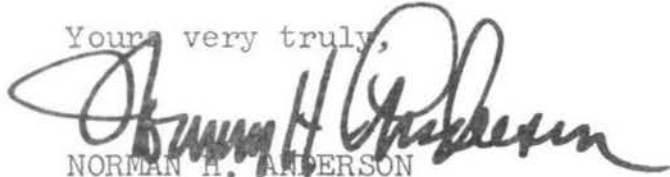
#### CONCLUSION

Therefore, it is the opinion of this office that Section 165.087, RSMo 1959, was repealed by implication by the statutes placing the office of county clerk on a salary basis and that this Section was formally repealed by Senate Bill 3, of the 72nd General Assembly, Laws 1963, p.200. Therefore, a county clerk of a third class county is not entitled to claim compensation under Section 165.087, RSMo 1959, for services rendered subsequent to the placing of that office on a salary, as opposed to a fee, basis.

Honorable Charles H. Sloan

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Louis C. DeFeo, Jr.

Yours very truly,

A large, stylized handwritten signature in dark ink, appearing to read "Norman H. Anderson".

NORMAN H. ANDERSON  
Attorney General

Enclosure:

Opinion 41, Holman, 11-4-53

July 26, 1966

OPINION NO. 362  
Answered By Letter  
(Ashby)

First Lt. Richard F. Whipple, USAF  
Assistant Staff Judge Advocate  
Department of the Air Force  
Richards-Gebaur Air Force Base  
Grandview, Missouri



Dear Lt. Whipple:

This letter is in response to your inquiry whether a non-resident serviceman present in Missouri pursuant to military orders is liable for a municipal motor license tax if the serviceman elects to register his motor vehicle in Missouri.

We are cognizant of the impact of California v. Buzard, 86 S.C. 478, 382 U.S. 386, 15 L.Ed. 2d 436. We agree, as a general proposition of law, that a state (or any of its subdivisions) cannot require, as a preliminary to "registration" of a motor vehicle of a nonresident serviceman, payment of a tax which is essentially a revenue producing tax. The issue may arise however whether the ordinance in question is a license or a tax.

You refer in your brief to the city of Grandview. We assume the tax question arises there.

However, we do not exercise supervision or review of the legislative acts of any city within this state. We suggest that if you desire to challenge the validity of this ordinance, you should do so in a proper forum, that is to say, in a court.

We regret we cannot be of greater assistance to you. However, our authority is limited by statute and we cannot extend our authority beyond that specified by law.

We have written some opinions in this area which may be of

First Lt. Richard F. Whipple

some assistance to you. These are Opinions of the Attorney General No. 95, dated February 16, 1966, and No. 318, dated June 28, 1966, which are enclosed.

If we can be of any further assistance, please let us know.

Yours very truly,

NORMAN H. ANDERSON  
Attorney General

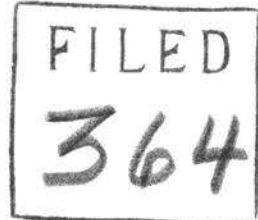
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Enclosures:

Opinion No. 95 (1966)  
Opinion No. 318 (1966)

OPINION NO. 364  
Answered by letter  
(Denman)

July 12, 1966



Honorable Gerald Kiser  
Prosecuting Attorney  
Clay County  
Liberty, Missouri 64068

Dear Mr. Kiser:

This is in answer to your request for an opinion of this office regarding an interpretation of subparagraph (5) of paragraph 3 of Section 302.309, RSMo Cum. Supp., when considered in conjunction with Section 302.060, RSMo Cum. Supp.

Paragraphs (1) and (2) of subsection 3 of Section 302.309 provide as follows:

"(1) All circuit courts and magistrate courts located in counties which are a part of a multi-county judicial circuit shall have jurisdiction to hear applications for hardship driving privileges.

(2) When any court of record having jurisdiction finds that a chauffeur or operator is required to operate a motor vehicle in connection with his business, occupation or employment, the court may grant such limited driving privilege as the circumstances of the case justify if the court also finds undue hardship on the individual in earning a livelihood, and while so operating a motor vehicle within the restrictions and limitations of the court order the driver shall not be guilty of operating a motor vehicle without a valid driver's license."

Paragraph (5) provides:

"This subsection does not apply to any person whose license has been suspended or revoked:

(a) For any reason which would have disqualified him or made him ineligible for a license under Section 302.060, \* \* \* "

Honorable Gerald Kiser

Section 302.060 provides that:

"The director shall not issue any license hereunder:

\* \* \* \* \*

(3) To any person, either as a chauffeur or as an operator, whose license as a chauffeur or as an operator has been suspended, during such suspension, or to any person, as a chauffeur or as an operator, whose license has been revoked, until the expiration of one year after such license was revoked; \* \* \* "

Your question is whether a person is prohibited from receiving limited driving privileges whose license has been suspended or revoked under the provisions of Section 302.060 (3).

The primary rule of statutory construction is first to seek the intention of the legislature and, if possible, to effectuate that intention. *Foremost Daries, Inc. v. Thomason, Mo. Banc.*, 384 SW 2d 651; *Household Finance Corp. v. Robertson, Mo. Supp.*, 364 SW 2d 595. In construing statutes which appear to be in conflict such statutes must be harmonized, if possible, with the general legislative purpose and give force and effect to each. *State v. Crouch*, 316 SW 2d 553; *State ex rel. McKittrick v. Carolene Products Co.*, 346 Mo. 1049, 144 SW 2d 153. To construe such statutes it is helpful to examine the legislative history thereof.

Section 302.060 was first enacted in 1937. Although it was amended in 1951 and again in 1961, the language of subparagraph (3) has remained unchanged. At the time of its original enactment and amendment in 1955, there was no statutory authorization allowing the courts to grant limited driving privileges to those whose licenses had been suspended or revoked. In view of this fact, the only reason for providing that a license should not be issued to one under such circumstances was to prevent the director from issuing a new or an original license to one whose license has been suspended or revoked. This would prevent one whose license was suspended or revoked from merely making an application and receiving another license under those statutes providing for the original issue. If Section 302.060 (3) is considered in this context, there is no conflict with Section 302.309.3 (5) for the reason that 302.060 (3) still would prevent one whose license was suspended or revoked from securing a new license, but would not prevent him from applying for limited driving privileges.



Honorable Gerald Kiser

As we stated earlier, at the time Section 302.060 was enacted there were no provisions authorizing the grant of limited driving privileges. By the enactment of Section 302.309 in 1961 it must be presumed that the legislature intended to enact meaningful legislation to change the existing law. State ex rel. M. J. Gorzik Corp. v. Mosman, 315 SW 2d 209. This purpose could only have been to change the law; to lessen the rigid requirements of license suspension and revocation by authorizing the courts to grant limited driving privileges when deemed advisable. If Sections 302.060 and 302.309 were literally construed to prevent persons whose license had been revoked or suspended from seeking limited driving privileges, enactment of Section 302.309 would be meaningless. To such a construction we cannot subscribe. See City of Joplin v. Joplin Water Works Company, Mo. Supp., 386 SW 2d 369; Wright v. J. A. Tobin Construction Co., Mo. App., 365 SW 2d 742; State ex rel. American Mfg. Co. v. Koeln, 278 Mo. 28, 211 SW 31.

In our opinion, the provisions of Section 302.309, RSMo Cum. Supp., when considered together with the other provisions of Chapter 302, clearly show that the legislative intent was to allow the courts to grant limited driving privileges to those whose license has been suspended or revoked.

Very truly yours,

NORMAN H. ANDERSON  
Attorney General

JHD/jlf

JUVENILE COURT:  
JUVENILE OFFICERS:  
MENTAL ILLNESS:  
MENTAL HOSPITALS:

A juvenile officer is not a police officer within the meaning of Section 202.803, RSMo 1959.

OPINION NO. 366

July 28, 1966

Dr. George A. Ulett, Director  
Division of Mental Diseases  
722 Jefferson Street  
Jefferson City, Missouri



Dear Dr. Ulett:

This opinion is in response to a request by your office concerning whether or not a juvenile officer or deputy juvenile officer is considered a "police officer" within the meaning of Section 202.803, RSMo 1959, relative to hospitalization of individuals without medical certification — emergency procedure. Section 202.803 in part reads as follows:

"1. Any health or police officer may take an individual into custody, apply to a hospital for his admission and transport him thereto for temporary confinement if such officer has reason to believe that \* \* \*".

This section differs from Section 202.800, RSMo, in that the latter section also permits "any other person" to make written application to the hospital upon medical certification.

We have given quite some thought to the definition of "police officer" as contained in Section 202.803 and are of the opinion that the definition must be restricted to its ordinary meaning. As stated in Webster's New International Dictionary, page 1754, "police officer" is defined as "a member of a police force."

Also, in Black's Law Dictionary, Fourth Edition, page 1317, police officer is defined as "One of the staff of men employed in the cities and towns to enforce the municipal police, i.e., the laws and ordinances for preserving the peace and good order of the community. Otherwise called 'policeman'".

Dr. George A. Ulett

This is not to say that "police officer" is restricted to municipal officers since obviously, the legislature intended the term to apply to other individuals with police functions in other political subdivisions. In an opinion which we issued to C. Frank Reeves, 10-8-57, we equated "police officer" as contained in this section with "sheriff" on the basic rule of statutory construction that we must seek the lawmaker's intent and if possible effectuate that intent. *Laclede Gas Company vs. City of St. Louis*, 363 Mo. 842, 253 S.W.2d 832.

The term "police officer" cannot be extended however, without giving broad powers to persons not authorized by the legislature either specifically or by necessary implication. Considering that the exercise of this emergency hospitalization procedure has a definite impact upon the individual who is allegedly mentally ill since it is without medical certification, we must conclude that a "juvenile officer" was not intended to be within the meaning of "police officer" as contained within Section 202.803.

#### CONCLUSION

It is the opinion of this office that a juvenile officer is not a police officer within the meaning of Section 202.803, RSMo 1959.

The foregoing opinion which I hereby approve was prepared by my assistant John C. Klaffenbach.

Yours very truly,

  
NORMAN H. ANDERSON  
Attorney General

PUBLIC ASSISTANCE:  
AID TO DEPENDENT CHILDREN:

Property owned by step-parent does  
not render child ineligible for aid  
to dependent children benefits.

August 30, 1966

OPINION NO. 371

Honorable Gordon R. Boyer  
Prosecuting Attorney  
Barton County  
Lamar, Missouri



Dear Mr. Boyer:

In your letter of June 24, 1966 you requested an opinion from this office which reads in part as follows:

"Does Section 208.010 preclude payment of Aid to Dependent Children, where the step-father has property in excess of \$6,000.00?

The facts are that an application was made by the natural mother of minor children for aid on the grounds that the natural father was confined in the state penitentiary. Her present husband, the step-father of the children, is the owner of property valued in excess of \$8,000.00. The natural mother of the children and the children live with the step-father."

This office has been informed that the step-father in question has made no attempt to legally adopt these children.

Section 208.010, Missouri Cumulative Supplement 1965, provides in part that:

"In determining the eligibility of a claimant for public assistance . . . it shall be the duty of the division of welfare to consider

Honorable Gordon R. Boyer

and take into account all facts and circumstances surrounding the claimant, including his living conditions, earning capacity, income and resources, from whatever source received, and if from all the facts and circumstances the claimant is not found to be in need, assistance shall be denied \* \* \*

It further provides that benefits shall not be payable to any claimant who:

"(4) Owns or possesses property of any kind or character, or has an interest in property, of which he is the record or beneficial owner, the value of such property, as determined by the division of welfare, less encumbrances of record, exceeds six thousand dollars, or if married and actually living with husband or wife, if the value of his or her property, or the value of his or her interest in property, together with that of such husband and wife, exceeds said amount; provided, however, that in the case of an aid to dependent children claimant this limitation shall apply only to property owned by parent and child or children in the home and not to other relatives with whom the child may reside."

Section 208.040, RSMo 1959 provides in part that aid shall be granted in behalf of any dependent child who is deprived of support or care by reason of the death, continued absence from the home, or physical or mental incapability of a "parent" and who is living with certain designated relatives including a "step-father."

Section 208.050, RSMo 1959 provides in part:

"Aid to dependent children benefits shall not be granted or continued with respect to any child:

"(2) Who is living in the home with a parent and step-parent, both of whom are able-bodied;"

This office is informed that the step-father is able to

Honorable Gordon R. Boyer

work on only a very limited basis, and further that he is under legal guardianship. Thus, we conclude that the step-father is not able-bodied within the meaning of Section 208.050, subsection 2, RSMo 1959.

The question submitted is whether the value of property owned by a step-parent is to be considered under Section 208.010 (4) in determining the eligibility of a child to receive aid to dependent children benefits.

Under the common law, in the absence of a statute, a step-parent is under no legal obligation to support his step-children. Stricklin v. Richters, Mo.App., 256 S.W.2d 53.

In the construction of statutes, words and phrases are taken in their plain and ordinary meaning. Section 1.090, RSMo 1959. The word "parent" in its common and accepted meaning refers to the natural parent or mother and does not include a "step-parent." The word "parent" usually denotes consanguinity rather than affinity. 67 C.J.S. "Parents", p. 624; 31 Words and Phrases, "Parents", p. 109.

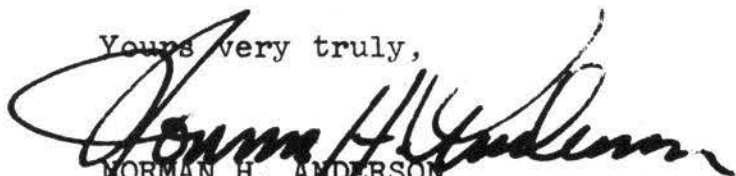
Apparently, the legislature recognized the distinction between parent and step-parent when these statutes were enacted because it used both terms which indicates that they did not intend for the word "parent" to include "step-parent." If the legislature had intended for the word "parent" used in Section 208.010 (4) supra, to include a "step-parent", it could have done so very easily by including the word "step-parent" as well as "parent" in said section.

#### CONCLUSION

It is the opinion of this office that under Section 208.010 (4), RSMo Supp 1965, the value of property owned by a step-parent is not to be considered in determining the eligibility of a parent for aid to dependent children under Section 208.040, RSMo.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Moody Mansur.

Yours very truly,

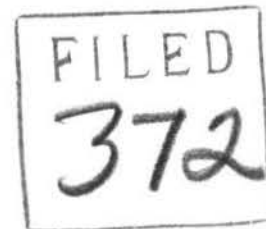
  
NORMAN H. ANDERSON  
Attorney General



COUNTY CLERKS: The following local option laws within the  
LOCAL OPTION LAWS: meaning of Section 51.135, RSMo Cum. Supp. 1965  
should be reported by the County Clerk to the  
Revisor of Statutes: (1) Planning and Zoning,  
Class two and three counties, Sections 64.510-64.690, RSMo as amended  
(2) Township Organization, Sections 65.010-65.050, RSMo (3) Counties  
may join in performance of common functions or services, including  
purchase, construction and maintenance of hospitals, almshouse, etc.,  
on vote of people, Sections 70.010-70.090, RSMo (4) Local Option  
County Registration, Chapter 114, RSMo as amended (5) Election to  
abolish or retain office of county superintendent of schools, Sections  
179.210 - 179.220, RSMo Cum. Supp. 1965 (6) County Health Centers,  
Section 205.010, et seq, RSMo as amended (7) Eradication and control  
of Johnson Grass, Sections 263.255-263.267, RSMo (8) Animals restrained  
from running at large, Chapter 270, RSMo (9) Fences and Enclosures,  
Sections 272.210-272.370, RSMo Cum. Supp. 1965 (10) Local Option Dog  
Tax, Sections 273.040 - 273.180, RSMo.

September 15, 1966

Honorable Clarence P. Lehen  
Prosecuting Attorney  
Montgomery County Courthouse  
Montgomery City, Missouri



OPINION NO. 372

Dear Mr. Lehen:

This is in response to your request for an official opinion of  
this office which you stated as follows:

"An opinion is hereby requested concerning matters  
contained in Chapter 51, Laws of the State of Mis-  
souri, in Section 51.135, as follows:

\* \* \* \* \*

" \* \* \* a list of all laws considered 'local option  
laws' is requested."

Section 51.135, RSMo Cum. Supp. 1965, reads as follows:

"1. In addition to his other duties provided by  
law, the clerk of each county court in this state  
shall provide the revisor of statutes with a com-  
plete list setting forth each Missouri statute,  
commonly known as a local option law, which is in  
effect in his county by reason of its provisions  
having been adopted by a vote of the people of  
that county."

Honorable Clarence P. Lehn

"2. The original list shall be mailed by certified mail to the revisor of statutes before July 1, 1966, and thereafter the clerk of the county court of each county shall promptly notify the revisor by certified mail upon adoption by a vote of the people of his county of the provisions of any such statute."

The words "local option" imply the grant of the right to one locality to adopt and to another to decline to avail itself of a law. Ex parte Handler, 176 Mo. 383, 75 S.W. 920.

A class of laws which is known in common parlance as "local option laws" may relate to such subjects as intoxicating liquor or the running of cattle at large and may be differently regarded in different localities. They are within the class of police regulations in respect to which it is proper that the local judgment control. In re O'Brien, 29 Mont. 530, 75 P. 196, 1 Ann. Cas. 373.

Laws of a general nature which by the General Assembly may be thought desirable by the inhabitants of certain localities within the state but undesirable by inhabitants of other localities, sometimes known as "local option laws", depend for their execution and enforcement on the votes of some portion of the people. Holcombe v. Georgia Milk Producers Confederation, 188 Ga. 358, 3 S.E. 2nd 705. Similarly, a local option law is considered a law to take effect or not to take effect in a given locality upon the consent or dissent of the voters of that locality, or upon other contingencies, while it may have effect in other localities. State v. Brown, 19 Fla. 563.

Am. Jur. defines local option laws as follows:

"There are in the cases examples of statutes which by their terms are in force only in such localities as may adopt the statute. A law of this kind, which by its terms may be made applicable to any county or subdivision thereof or any precinct therein by a vote taken at an election ordered for the purpose, is in the nature of a floating enactment until it is made applicable to a particular locality in the mode prescribed. \* \* \*" 50 Am. Jur., Statutes, § 11.

Honorable Clarence P. Lehn

The term "local" with reference to a law or class of laws should be construed to mean that which operates only within a limited territory or specified locality. An act operating upon persons or property in a single city or county, or any two or three counties would be local. People v. Newburgh and S. Plank Road Company, 86 N. Y. 1.

While normally used and defined in a contract consideration, "option" has been defined as the privilege or right of election to exercise a privilege. Suhre v. Busch, Mo., 120 S.W. 2d 47. Further, "option" has been defined as the power of choosing; right of election; alternative. It is the right of choice between two things, courses or propositions. It is loosely spoken of as the right of choice between several things or courses. Malone v. Meres, Fla 109 So. 677. In the context under consideration, therefore, the term "option" can be thought of as the right of the voters of a locality to avail or not to avail themselves of a law.

The word "locality" signifies a particular district; confined to a limited region; opposed to "general"; limited by boundaries, large or small -- as a country, a state, a county, a town or a portion thereof. Pierce v. Dillingham, 96 Ill. App. 300.

We then want to ascertain the meaning of Section 51.135, RSMo Cum. Supp 1965:

"\* \* \*the clerk \*\* shall provide \*\* a complete list setting forth each Missouri statute, commonly known as a local option law, which is in effect in his county by reason of its provisions having been adopted by a vote of the people of that county."

In applying the foregoing principles to the language used in this statute it appears certain that it applies to those local option laws which are adopted by the people of an entire county and not to an area comprising merely part of a county. Also it applies to those laws that are enforceable by county authorities and not to the formation of legal entities containing either part or all of a county.

In light of these principles, the following Missouri statutes which take effect upon a vote of the people of the County in which they are enacted are considered local option laws within the meaning of Section 51.135, RSMo. Cum. Supp. 1965:

Honorable Clarence P. Lehnen

1. Planning and Zoning - Class two and three counties, Sections 64.510 - 64.690, RSMo as amended.
2. Township Organization, Chapter 65 RSMo 1959.
3. Counties May join in performance of common functions or services including purchase, construction and maintenance of hospitals, almshouses, etc., on vote of people, Sections 70.010-70.090, RSMo 1959.
4. Local Option County Registration, Chapter 114, RSMo as amended.
5. Election to abolish or retain office of county superintendent of schools, Sections 179.210 - 179.220, RSMo Cum. Supp. 1965.
6. County Health Centers, Section 205.010, et seq, RSMo as amended.
7. Eradication and Control of Johnson Grass, Sections 263.255 - 263.267, RSMo 1959.
8. Animals restrained from running at large, Chapter 270, RSMo 1959.
9. Fences and Enclosures, Sections 272.210 - 272.370, RSMo Cum. Supp. 1965.
10. Local Option Dog Tax, Sections 273.040-273.180, RSMo, 1959.

While there are a number of statutes in Missouri which have some of the attributes of local option laws we think they do not properly fall within the statutory definition of Section 51.135, RSMo Cum. Supp. 1965. For example Constitutional Charter Counties of First Class may organize and create special school districts for handicapped children, Section 178.640 - 178.765, RSMo Cum. Supp. 1965; County Library Districts, Section 182.010, RSMo 1959, Hospital District Law, 206.010 et seq, RSMo Cum. Supp. 1965, Soil Conservation Districts, Section 278.060-278.150, RSMo Cum. Supp. 1965, Sale of Liquor by Drink in Incorporated Areas, Section 311.110-311.170, RSMo 1959, Fire Protection Districts, Chapter 321, RSMo Cum. Supp. 1965.

Honorable Clarence P. Lehnen

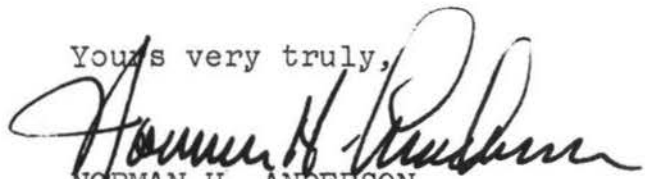
CONCLUSION

It is the opinion of this office that the following local option laws within the meaning of Section 51.135, RSMo Cum. Supp. 1965, should be reported by the County Clerk to the Revisor of Statutes:

1. Planning and Zoning Class two and three counties, Sections 64.510-64.690, RSMo as amended.
2. Township Organization, Sections 65.010-65.050, RSMo.
3. Counties may join in performance of common functions or services, including purchase, construction and maintenance of hospitals, almshouse, etc., on vote of people, Sections 70.010-70.090, RSMo.
4. Local Option County Registration, Chapter 114, RSMo as amended.
5. Election to abolish or retain office of county superintendent of schools, Sections 179.210 - 179.220, RSMo. Cum. Supp. 1965.
6. County Health Centers, Section 205.010, et seq, RSMo as amended.
7. Eradication and Control of Johnson Grass, Sections 263.255-263.267, RSMo.
8. Animals restrained from running at large, Chapter 270, RSMo.
9. Fences and enclosures, Sections 272.210-272.370, RSMo Cum. Supp. 1965.
10. Local Option Dog Tax, Sections 273.040-273.180, RSMo.

The foregoing opinion which I hereby approve was prepared by my Assistant J. Gordon Siddens.

Yours very truly,

  
NORMAN H. ANDERSON  
Attorney General

PROBATE JUDGE:  
COUNTY COURT:  
BUDGET:  
BUDGETARY ESTIMATES:  
BUDGET LAW:

A probate judge may hire additional stenographers and clerks as needed and pay them salaries up to and including the amount of the preceding year's fees when such was included in the probate judge's budget.

August 30, 1966

OPINION NO. 374



Honorable William D. Kimme  
Prosecuting Attorney  
Franklin County  
Union, Missouri

Dear Mr. Kimme:

This is in answer to your request for an opinion, which request reads as follows:

"There has arisen here in Franklin County a question concerning the interpretation of the Missouri Revised Statute 483.075, subsection 2, RSMo. 1965.

"During the calendar year 1965, such Probate Court collected and delivered to the County Treasurer the sum of \$14,063.67, representing the total of probate fees received and accounted for by the Judge of this Court for such year.

"In his 'officer's budget estimate' submitted by the Probate Judge during January 1966, and covering estimated salaries for 1966, the Judge listed his estimated Clerk's annual salary as \$4200.00 and his Deputy Clerk's salary as \$3900.00, following which it was stated as follows: 'authorized to expend up to \$14,063.67 for salaries of clerks, assistants and stenographers, including additional personnel should unexpected need for same arise during year 1966.' This latter budget entry was ignored by the County Court and Budget Officer in compiling the consolidated county budget which was presented to and approved by the Missouri State Auditor.



Honorable William D. Kimme

"During June of 1966 the Deputy Clerk resigned to accept a position with a private employer, at which time the Judge deemed it necessary in order to maintain proper function of his office to employ both a new Deputy Clerk and a Court Stenographer. On June 6th an order was entered in the Probate Record appointing a Deputy Clerk at the monthly salary of \$300.00, and on June 20th an order was entered employing a Court Stenographer at the monthly salary of \$250.00.

"The Judge states that the County Court and Budget Officer were or should have been aware of the import of the revised statute in question, and that the amount of probate fees collected during 1965 is a matter of public record. Therefore, he contends that the County Court and Budget Officer have no authority to controvert such statute by the simple expedient of neglecting or refusing to include the figure of \$14,063.67, as stated in his office budget, in the consolidated county budget.

"The question I would like to present at this time is whether or not the Probate Judge has a right under the statute and under the budget as submitted, although his entry was ignored, to hire additional stenographers and clerks as needed up to and including the figure covered by the statute."

Section 483.475, RSMo Supp. 1965, provides for the appointment of probate clerks, assistants and stenographers by probate judges and reads in part as follows:

"1. In all counties now or hereafter having more than thirty thousand inhabitants, the probate judges shall appoint their own clerks, assistants and stenographers, and shall determine their number and their salaries by order of record and may remove them when in the discretion of the judges it is deemed advisable. All salaries of the judges and their appointees shall be paid monthly by the county, upon requisition issued by the judge of such court.

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"2. In all counties now or hereafter having more than thirty thousand and less than two hundred and fifty thousand inhabitants, the total salaries of all clerks, assistants and stenographers in the probate court for any one calendar year shall not exceed the total sum of fees received and accounted for by the judge of such court for the preceding year, except that in no event shall the total sum exceed twenty thousand dollars, and except that in counties where the total sum of fees received and accounted for by the judge for the preceding year shall be less than four thousand two hundred dollars the total salaries of all clerks, assistants and stenographers shall not exceed the sum of four thousand two hundred dollars.

"3. In any county where need exists, the county court is authorized to provide such additional clerks, deputy clerks or other employees in the probate court as the county court in its discretion believes are required and is authorized to provide funds for payment of salaries or parts of salaries of the clerks, deputy clerks and employees in addition to the maximum amounts hereinbefore specified."

We note that Franklin County is a class 3 county and now has a population of more than 30,000 but less than 250,000 persons. Therefore, the probate judge of Franklin County has the power to appoint clerks and stenographers and set their salaries during 1966 so long as the total salaries do not exceed the fees collected in 1965 which amounted to \$14,063.67.

Probate Courts of class three counties must prepare and submit to the county budget officer an estimate of expenditures and revenues. Section 50.540, RSMo Supp. 1965. This section reads in part as follows:

"1.\* \* \* on or before the fifteenth day of January in counties of classes three and four each department, office, institution, commission, or court of the county receiving its revenues in whole or in part from the county shall prepare and submit to the budget officer estimates of its requirements for expenditures and its estimated revenues for the next budget year \* \* \*.

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"2. The budget officer shall review the estimates, altering, revising, increasing or decreasing the items as he deems necessary in view of the needs of the various spending agencies and the probable income for the year.

\* \* \* \* \*

"4.\* \* \* The budget officer shall recommend and the county court shall fix all salaries of employees, other than those established by law, except that no salary for any position shall be fixed at a rate above that fixed by law for the position.\* \* \*"  
(Emphasis ours)

In *Bash v. Truman*, 335 Mo. 1077, 75 S.W.2d 840 (1934) the sheriff of Jackson County brought a writ of prohibition action against the judges of the county court complaining that the county court could not fix salaries and limit the number of deputies of the sheriff. The Court said that prohibition will not lie to control administrative or legislative powers, that the sheriff had no vested right in the number of his deputies or their salaries, and that the power to fix salaries is purely legislative in character and subject to legislative control. In that case the legislature had delegated to the county court and not to the sheriff the power to fix the salaries of deputies.

In the question presented, here, the legislature, by Section 483.475, *supra*, specifically gave the probate judge the power to fix the number of his employees and their salaries.

In *Miller v. Webster County, Mo.*, 228 S.W.2d 706 (1950), the prosecuting attorney submitted in his budget estimate an item for \$600 for necessary stenographic hire for 1949. The county court struck the item from the budget. The prosecuting attorney then in February, 1949, expended \$43 for a stenographer. The prosecutor brought an action to recover the amount expended but the Court held that in absence of legislation providing for a salary for stenographic service the county court had power to make whatever allowance it deemed necessary.

Again that is not the case here where the legislature gave the power to the probate judge to hire and set salaries. Section 483.475, *supra*.

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In Gill v. Buchanan County, 346 Mo. 599, 142 S.W.2d 665 (1940), the Court said, concerning a county judge's salary when the county budget provided less than the statutory salary, l.c. S.W.2d 668, 669:

"The action of the Legislature in fixing salaries of county officers is in effect a direction to the county court to include the necessary amounts in the budget. Such statutes are not in conflict with the County Budget Law but must be read and considered with it in construing it. They amount to a mandate to the County Court to budget such amounts. Surely no mere failure to recognize in the budget this annual obligation of the county to pay such salaries could set aside this legislative mandate and prevent the creation of this obligation imposed by proper authority. Certainly such obligations imposed by the Legislature were intended to have priority over other items as to which the county court had discretion to determine whether or not obligations concerning them should be incurred. They must be considered to be in the budget every year because the Legislature has put them in and only the Legislature can take them out or take out any part of these amounts. This Court has held that the purpose of the County Budget Law was 'to compel \* \* \* county courts to comply with the constitutional provision, section 12, art. 10' by providing 'ways and means for a county to record the obligations incurred and thereby enable it to keep the expenditures within the income.' Traub v. Buchanan County, 341 Mo. 727, 108 S.W.2d 340, 342.

" To properly accomplish that purpose, mandatory obligations imposed by the Legislature and other essential charges should be first budgeted, and then any balance may be appropriated for other purposes as to which there is discretionary power. Failure to budget funds for the full amount of salaries due officers of the county, under the applicable law, which the county court must obey, cannot bar the right to be paid

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the balance. Instead, it must be the discretionary obligations incurred for other purposes which are invalid, rather than the mandatory obligation imposed by the same authority which imposed the budget requirements. We, therefore, hold that a county court's failure to budget the proper amounts necessary to pay in full all county officers' salaries fixed by the Legislature, does not affect the county's obligation to pay them."

In State ex rel. Williamson v. County Court of Barry County, Mo., 363 S.W.2d 691, a deputy circuit clerk brought a mandamus proceeding to compel the county court to issue warrants for unpaid salary. The circuit clerk in his budget estimate included the salary of \$2,400 for the deputy clerk but the county only budgeted \$2,100. The clerk, under statutory authority, had appointed the deputy clerk and fixed the compensation and this had been approved by the circuit court. The court quotes from Gill v. Buchanan County, supra, and states, l.c. 695:

"\* \* \* The order of the circuit judge made pursuant to Section 483.345 constituted a direction or mandate to the county court to include \$2,400 in the budget for the purpose stated in the order, and the county court had no more authority to ignore this valid directive by budgeting a lesser amount than it would have to budget an amount for salaries of county judges at an amount greater than that fixed by the Legislature. The provisions of Section 50.740 cited and relied on by appellants, and quoted above, do not prohibit the issuance of the warrants in this case. The warrants would not be issued contrary to any provisions of the budget law when that law is read with and construed in its relation to Section 483.345."

It is, therefore, our opinion that when the probate judge included in his budget an item to authorize the expenditure up to the amount of the preceding year's fees for salaries for clerks, assistants and stenographers, including additional personnel should an unexpected need for same arise during 1966 that this was a mandate to the county court to include this amount in the budget.

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The county court had no authority or discretion to ignore this amount as this item was established by law, that is by Section 483.475, supra.

CONCLUSION

It is the opinion of this office that a probate judge may hire additional stenographers and clerks as needed and pay them salaries up to and including the amount of the preceding year's fees when such was included in the probate judge's budget.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Walter W. Nowotny, Jr.

Yours very truly,

  
NORMAN H. ANDERSON  
Attorney General



CHILDREN:  
DEPENDENTS:  
CHILD ABANDONMENT:

The putative father of an illegitimate child may be prosecuted for abandonment of the child under either Section 559.353 or Section 559.356, 1965 Cum. Supp., whether he has legal custody of the child or not.

November 22, 1966

OPINION NO. 378

Honorable Donald E. Dalton  
Prosecuting Attorney  
St. Charles County  
St. Charles, Missouri



Dear Mr. Dalton:

This is in response to your request for an opinion concerning your continued ability to successfully prosecute the putative father of an illegitimate child under Section 559.-353, RSMo Cum. Supp. 1965, where the father has never had legal custody. That section and Section 559.356, RSMo 1965 Cum. Supp., must be read together. They are as follows:

Section 559.353 -

"Any man who, without good cause, fails, neglects or refuses to provide adequate food, clothing, lodging, or medical or surgical attention for his wife; or any man or woman who, without good cause, abandons or deserts or, without good cause, fails, neglects or refuses to provide adequate food, clothing, lodging, or medical or surgical attention for his child born in or out of wedlock, under the age of sixteen years, or if any person, not the father or mother, having the legal care or custody of such minor child, without good cause, fails, refuses or neglects to provide adequate food, clothing, lodging, or medical or surgical attention for the child, whether or not in either such case the child by reason of such failure, neglect or refusal actually suffers physical or

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material want or destitution, is guilty of a misdemeanor and upon conviction thereof shall be punished as provided by law."

Section 559.356 -

"Any man who leaves the state of Missouri and takes up his abode in some other state and leaves his child under the age of sixteen years in the state of Missouri, and, without just cause or excuse, fails, neglects or refuses to provide his child with adequate food, clothing, lodging, or medical or surgical attention shall be guilty of a felony and upon conviction thereof shall be imprisoned by the department of corrections for a term of two years. It shall be no defense to such charge that some person or organization other than the defendant has furnished food, clothing, lodging, medical or surgical attention for said child or children, nor shall this statute be construed so as to relieve said person from the criminal liability defined herein for such omission merely because the mother of such child or children, in case of the father, is legally entitled to the custody of such child or children, nor because the mother of such child or children, or any other person, or organization, voluntarily or involuntarily furnishes such necessary food, clothing shelter or medical or surgical attention, or undertakes to do so."

The difficulty is that prior to the 1965 amendment, the provisions of Section 559.353 and Section 559.356 existed in one statute, Section 559.350, RSMo 1959. That statute was enacted in 1953 in the wake of the decision in *State v. White*, 248 S.W.2d 841, which held that the putative father could not be prosecuted if he did not have legal custody of the child.

Prior to 1953, Section 559.350, was as follows, except that the underscored words were not included:

Honorable Donald E. Dalton

"If any man shall, without good cause, fail, neglect or refuse to provide adequate food, clothing, lodging, medical or surgical attention for his wife; or if any man or woman shall, without good cause, abandon or desert or shall without good cause fail, neglect or refuse to provide adequate food, clothing, lodging, medical or surgical attention for his or her child or children born in or out of wedlock, under the age of sixteen years, or if any other person, not the father or mother, having the legal care or custody of such minor child, shall without good cause, fail, refuse or neglect to provide adequate food, clothing, lodging, medical or surgical attention for such child, whether or not, in either such case such child or children, by reason of such failure, neglect or refusal, shall actually suffer physical or material want or destitution; or if any man shall leave the state of Missouri and shall take up his abode in some other state, and shall leave his wife, child or children in the state of Missouri, and shall, without just cause or excuse, fail, neglect or refuse to provide said wife, child or children with adequate food, clothing, lodging, medical or surgical attention, then such person shall be deemed guilty of a misdemeanor; and it shall be no defense to such charge that the father does not have the care and custody of the child or children or that some person or organization other than the defendant has furnished food, clothing, lodging, medical or surgical attention for said wife, child or children, and he or she shall, upon conviction, be punished by imprisonment in the county jail not more than one year, or by fine not exceeding one thousand dollars or by both such fine and imprisonment. No other evidence shall be required to prove that such man was married to such wife than would be necessary to prove such fact in a civil action." (Underscoring ours.)

The underscored words were added in the 1953 amendment to meet the objections of the Supreme Court in the White case.

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The decision in the White case was predicated on a previous decision in State ex rel. Canfield v. Porterfield, 292 S.W. 85, which held:

"\* \* \* Therefore, we do not think that Section 559.350, a criminal statute, can be reasonably construed as creating this legal duty especially in view of the words 'any other person having the legal care or custody of such minor child'. As said in the Canfield case, 'The use of the words "or any other person," etc., in these sections, which statutes must be strictly construed, shows that the words apply to persons who are charged with the care and custody of the child whether it be a parent or other person so charged.' \* \* \*

(Emphasis the Court's)

As can be seen above, two parts were added to the statute in 1953 so as to make it clear that the legislature meant that putative fathers be charged whether they had legal custody or not, i.e., that mothers and fathers were to be charged with the care of the child regardless and the phrase "not the father or mother" was included so as to indicate that the phrase "having the legal care or custody of such minor child" was to apply to persons other than mothers and fathers only. Then, to make doubly certain, the phrase "and it shall be no defense to such charge that the father does not have the care and custody of of the child or children" was added. The latter provision now is contained only in Section 559.356, which makes it a felony to abandon a child and leave the state. Doubtless, this is an inadvertent consequence of the legislative attempt to make a logical division between misdemeanor and felony charges, but unfortunately, it leaves the waters somewhat muddled.

Nevertheless, the phrase "not the father or mother" is still contained in the misdemeanor section (559.353) and may be deemed to have the same effect. Furthermore, the offending word "other" as referred to in the Canfield case above has been expunged and consequently the point upon which the Canfield and White cases turned has been removed from the statute. Thus, we believe it amply clear that the legislative intent to charge putative fathers with abandonment regardless of legal custody is present in the language employed in the misdemeanor section, Section 559.353, as well as the felony section, Section 559.356, 1965 Cum. Supp.


Honorable Donald E. Dalton

CONCLUSION

The putative father of an illegitimate child may be prosecuted for abandonment of the child under either Section 559.353 or Section 559.356, 1965 Cum. Supp., whether he has legal custody of the child or not.

The foregoing opinion which I hereby approve was prepared by my Assistant, Howard L. McFadden.

Very truly yours,



NORMAN H. ANDERSON  
Attorney General

Opinion No. 382  
Answered by Letter(DeFeo)

July 5, 1966



Mr. Robert C. Lindstrom, Director  
Division of Aging  
Office of Urban Affairs  
Jefferson Building  
Jefferson City, Missouri

Re: Older Americans Program

Dear Mr. Lindstrom:

I am in receipt of your letter of June 22, 1966, requesting further specification as to the authority of the office of State and Regional Planning and Community Development in connection with the State Plan under the Older Americans Act. This letter will supplant and replace our earlier letter dated June 14, 1966.

At your request we have reviewed the State Plan for services to Older Missourians prepared pursuant to the Older Americans Act of 1965 (P.L. 89-73), together with the letter of Governor Warren E. Hearnes to John W. Gardner, Secretary, U. S. Department of Health, Education and Welfare, dated May 31, 1966, in which the office of State and Regional Planning and Community Development was designated the State Agency for participation in the Older Americans Act. We have also considered Senate Bill 14, Second Extra Session, 73d General Assembly, which establishes the State Planning office. We are informed that the State Plan will be amended so as to conform with the Governor's redesignation of the State Agency.

Based on the foregoing, we hereby certify that upon the effective date of Senate Bill 14, the office of State and Regional Planning and Community Development has been designated to be the sole State Agency responsible for administering the

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Mr. Robert C. Lindstrom - 2

Older Americans Program and that it is primarily responsible for the coordination of State programs and activities in connection with the Older Americans Act. It is our judgment that the State Agency has authority to submit a State Plan in cooperation with the Federal Government and that nothing in the State Plan is inconsistent with the provisions of State law.

Very truly yours,

Louis C. DeFeo, Jr.  
Assistant Attorney General

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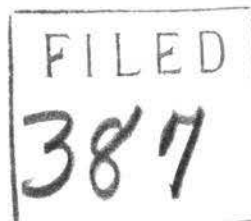
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August 11, 1966

OPINION NO. 387  
Answered by Letter  
Stevens

Honorable Mark Scully  
President  
Southeast Missouri State College  
Cape Girardeau, Missouri 63701



Dear Mr. Scully:

In your letter of July 8, 1966, requesting an opinion from this office, you state that in connection with your student nurses program, you have an agreement with the Southeast Missouri Hospital in Cape Girardeau, Missouri, whereby the student nurses receive laboratory at the hospital. You further state that the hospital carries compensation insurance on all of its employees and that the hospital has informed you that the student nurses are covered by the hospital compensation program.

You ask first, if the student nurses are to be considered employees of the hospital, and if injured, would they be covered by the Workmen's Compensation Law.

Second, you ask that "in the event the College agreed to allow student nurses to come within the coverage of the hospital Workmen's Compensation Program, as employees, would this be tantamount to an election by the College for a portion of its students or employees to come within the Act, thereby obligating the College to enter into a program for all its employees or causing it to have Workmen's Compensation liability to its employees?"

To answer your second question first, the fact that your student nurses may be considered employees of the hospital and hence covered by the Workmen's Compensation Law would in no wise affect the College.

We do not think it necessary to determine whether or not the student nurses are employees of the hospital and hence, subject to coverage under the Act. You have informed us that the Attorney for the hospital has rendered an opinion that these are "employees" of the hospital and covered by the Act.

Honorable Mark Scully

Page 2

This is a question that concerns only the hospital and the students. If they are "employees" of the hospital, this in no way affects the College. This fact would not obligate the College in any way nor would it bring other employees of the College under the Workmen's Compensation Act.

We do not believe that you should either approve or disapprove of this coverage of the students, as you are not affected thereby.

Very truly yours,

NORMAN H. ANDERSON  
Attorney General

OHS/fb

PREVAILING WAGES:  
CONSTRUCTION WORK:  
MAINTENANCE WORK:  
REPAINTING:

The repainting of bridges on State highways is "construction" within the meaning of, and therefore included in the operation of, the prevailing wage law, Sections 290.210 to 290.310, RSMo, as amended.

OPINION NO. 388

October 25, 1966

Honorable James J. Butler, Chairman  
Industrial Commission of Missouri  
State Office Building  
Broadway and High Streets  
P. O. Box 599  
Jefferson City, Missouri



Dear Mr. Butler:

This is in answer to your request for an opinion of this office which you have stated in part as follows:

"It is respectfully requested that you examine the statutes . . . and in particular, Section 290.210 (1) and (5), and Section 290.230, 1, and favor us with your opinion as to whether or not the repainting of bridge structures constitutes 'maintenance work' or 'construction' as contemplated by the statutes indicated.

"As you are aware, the laws pertaining to the payment of wages on public works exclude workmen employed by or on behalf of any public body engaged in maintenance work as defined by the statute. The question has arisen in connection with the repainting of bridge structures on highway projects where the Missouri State Highway Department has let contracts for such repainting and consider them as maintenance. You will note that Section 290.210 (1) includes painting within the definition of 'Construction'. There would seem to be no question that the original painting on such projects would constitute 'construction' as defined. However, where repainting is involved it would appear that some confusion has arisen as to whether or not this constitutes construction or maintenance as contemplated by the act.

Honorable James J. Butler

"We believe that the definition of 'Construction' should control and that all painting of such projects constitutes the construction of public works and that accordingly, the contractor engaged in such painting should be required to pay not less than the prevailing hourly rate of wages to the workmen so employed."

Section 290.210, RSMo Cum. Supp. 1965, states in pertinent part:

"(1) 'Construction' includes construction, reconstruction, improvement, enlargement, alteration, painting and decorating, or major repair;

"(5) 'Maintenance work' means the repair, but not the replacement, of existing facilities when the size, type or extent of the existing facilities is not thereby changed or increased;"

The legislature may define certain words used in a statute and the Court is bound by such definition without enlarging or diminishing the meaning provided by the statute, although otherwise the language would have been construed to mean a thing different from that contemplated by such statutory definition. 82 C.J.S., Statutes, Section 315, Pages 536 to 538.

In construing statutes, there is a presumption that every word, sentence, or provision was intended for some useful purpose, and has some force and effect. Conversely, it will not be presumed that the legislature inserted idle or meaningless verbiage, or superfluous language, or intended any part or provision to be meaningless, redundant, or useless. 82 C.J.S., Statutes, Section 316, Pages 551-552; State ex rel. Kelsey v. Smith, Mo., 75 S.W.2d 832; Dodd v. Independence Stove & Furnace Co., Mo., 51 S.W.2d 114; State ex rel. St. Louis Die Casting Corp. v. Morris, Mo., 219 S.W.2d 359.

In accordance with the rule or maxim of *noscitur a sociis*, doubtful words and phrases used in statutes are construed in connection with the words and phrases with which they are associated. 82 C.J.S., Statutes, Section 331, Page 654. Under this rule, the meaning of a word may be enlarged or restrained

Honorable James J. Butler

by reference to the whole clause in which it is used. O'Malley v. Continental Life Ins. Co., Mo., 75 S.W.2d 837.

In 82 C.J.S., Statutes, Section 332, Page 658, it is said:

"Following the grammatical rule, where general words occur at the end of a sentence they refer to and qualify the whole; but if they are in the middle of the sentence and sensibly apply to a particular portion of it, they are not to be extended to what follows them."

This statement is merely the converse of the rule of ejusdem generis, which states that where general words follow the enumeration of particular classes of persons or things, the general words will be construed as applicable only to persons or things of the same general nature or class as those enumerated, State v. Lawson, Mo., 181 S.W.2d 508, 512.

Applying the above rules of statutory construction to the quoted part of Section 290.210, supra, it is apparent that the legislature intended to define and enlarge the meaning of the word "construction" so as to include more than is comprised in the ordinary meaning of the term. Further, by expressly including "painting" as well as "major repair" in the meaning of "construction", the legislature intended the prevailing wage law to apply to painting, in circumstances other than and in addition to occasions wherein painting constitutes a part of major repair or construction in the usual sense. Otherwise, the words "painting and decoration" would be superfluous because already included either within the term construction (as ordinarily understood) or the term "major repair."

The prevailing wage law excepts "maintenance work" from the operation of the act. By subsection (5), supra, "maintenance work" is defined as repair of existing facilities when the size, type or extent of the existing facility is not thereby changed or increased. The argument that repainting could be considered maintenance work or repair other than major, so as to fall within the exception thereof from the application of the act, is overridden by the above consideration that the definition of "construction" as including painting prevails over what might otherwise be considered repairs or maintenance.

It is noted that the Davis-Bacon Act, Public Law 403, 74th



Honorable James J. Butler

Congress, which is the Federal prevailing wage law, has been construed by the Solicitor of Labor to apply to repainting and steam and sand blast cleaning operations, "where these operations were authorized for the same purpose as painting and decorating," considering that "the classifications of employees and equipment used were those traditionally employed in the construction industry and the work was not of a regular nature such as could be considered as maintenance work." Opinion Letter of Solicitor of Labor No. D.B.-8, July 17, 1961. The same considerations meet with the spirit of the Missouri legislation.

In the opinion of the Attorney General of Missouri, dated April 30, 1958, addressed to Honorable Stephen N. Limbaugh, (Subsequently withdrawn on other grounds) it was ruled that "painting and repainting of steel bridges . . . comes within the definition of 'construction' since that definition 'includes . . . painting and decorating . . .'" (referring to Section 290.210, RSMo 1957, Cum. Supp.). The present statute is the same in the instant respect, and we adhere to the stated interpretation.

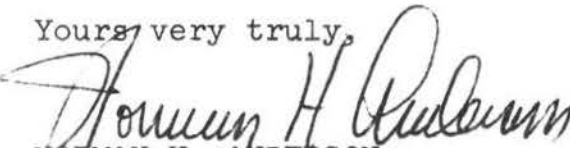
Note that the prevailing wage law applies only to painting when done by a contractor and not when done by a public body's own employees. City of Joplin v. Industrial Commission of Mo., Mo., 329 S.W.2d 687.

#### CONCLUSION

It is the opinion of the Attorney General that the repainting of bridges on State highways is "construction" within the meaning of, and therefore included in the operation of, the prevailing wage law, Sections 290.210 to 290.310, RSMo, as amended.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Donald L. Randolph.

Yours very truly,

  
NORMAN H. ANDERSON  
Attorney General

CORONERS: County coroner in counties other than St. Louis  
FUNERAL DIRECTORS: and first class counties has no authority to  
issue blanket instructions to funeral directors or undertakers not to embalm or otherwise mutilate a dead body until he is notified.

December 1, 1966

OPINION NO. 389

Honorable James L. Paul  
Prosecuting Attorney  
McDonald County  
Pineville, Missouri 64856



Dear Mr. Paul:

You inquire whether a coroner or sheriff has any authority to order a funeral home not to embalm a body which has been brought to the funeral home from a hospital when such victim was dead on the arrival at the hospital until authority to embalm is given by the coroner or sheriff.

We are enclosing herewith an opinion issued by this office on December 15, 1948, to Colonel Hugh H. Waggoner, Superintendent, Missouri State Highway Patrol, Jefferson City, Missouri, in which it was held that a coroner does not have any authority to issue blanket instructions to members of the State Highway Patrol that all dead bodies be left at the scene of the accident or similar occurrence until the coroner arrives and directs final disposition of the body.

We are also enclosing an opinion dated October 10, 1950, written to John M. Rice, Prosecuting Attorney, Newton County, Neosho, Missouri, in which it was ruled that no action can be taken against persons removing dead bodies from the jurisdiction of one coroner to another, and the coroner in the county where the accident or felony was committed has no authority to order the body returned for the purpose of holding an inquest.

The authority and duties of the coroner are discussed at length in the two enclosed opinions. As stated therein the coroner is a public officer and has only such authority as is expressly given him by statute or as necessarily implied in order to execute the duties expressly given by statute. The same is true of a sheriff.

Under Section 58.205, RSMo 1959, a sheriff of the proper county is to perform the duties of the coroner when the coroner is absent for any reason. Under this statute the sheriff's authority is limited to that of the coroner when acting as coroner.

Honorable James L. Paul

Section 58.180, RSMo 1959, provides in part that the coroner shall be a conservator of the peace throughout his county and shall take inquests of violent and casual deaths or when a dead body is found in his county.

Section 58.260, RSMo 1959, provides that every coroner as soon as he shall be notified of the dead body of any person supposed to have come to his death by violence or casualty, being found in his county, to summons a jury and to inquire how and by whom he came to his death.

In Patrick v. Employers Mutual Liability Insurance Co., 118 S.W.2d 116, the court in discussing the authority given the coroner by statute to perform an autopsy stated, l.c. 122:

"\* \* \* Of course, it is beyond the realm of probability that the legislature ever intended to confer upon a coroner the right to perform an autopsy in any case that, in his judgment, he might deem proper, for this would empower him to enter the homes of our citizens indiscriminately and over their protests remove corpses under any circumstances, regardless of the cause of death, provided that the coroner thought an autopsy, in a particular case, would further the advance of science or some purpose believed desirable by him. The legislature had no intention to confer any such authority upon the coroner.\* \* \*"

In State v. Stringer, 211 S.W.2d 925 (1948) our Supreme Court held there is no statutory duty on any person to inform the coroner of the presence of a dead body under Section 58.260, supra.

After this decision was rendered the legislature enacted Section 58.451, RSMo 1959, which provides in part that it is the duty of any person who has reasonable grounds to believe that the person died by criminal violence or following abortion in the City of St. Louis or in any county of the first class to notify the coroner and upon receipt of such notification the coroner shall take charge of the said body.

Under Section 58.260, RSMo 1959, when the coroner is notified of the presence of a dead body believed to have come to his death as a result of violence or casualty, it is a discretionary matter with the coroner to decide after his investigation whether an inquest should be held. Boisliniere v. The Board of County Commissioners, 32 Mo. 375. After the coroner has been notified of the presence of a dead body which supposedly came to his death by casualty or violence, his duties as a coroner

Honorable James L. Paul

arises. It is not his duty, and he has no authority until he has information of the presence of a dead body in his county that is supposed to have come to his death by violence or casualty. Since there is no legal duty upon any person to inform the coroner of the presence of such a body and no express authority given the coroner by statute (except in St. Louis City and first class counties), it is our opinion that he has no authority to require any person to notify him of the presence of a dead body, and likewise he has no authority to demand that an undertaker or funeral director not embalm or otherwise mutilate a dead body until he has been notified and taken charge of the body.

Certainly when the coroner is notified of the presence of a dead body that is supposed to have come to his death by casualty or violence the coroner has authority to take charge of said body and prevent any mutilation of any kind until he, in his discretion, decides whether an inquest should be held.

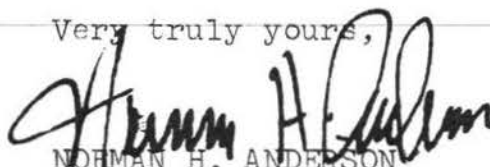
It is our opinion that a coroner in any county other than the City of St. Louis and counties of the first class has no authority to order or request an undertaker or funeral director not to disturb a dead body until the coroner has been notified of the presence of such body. Certainly the undertakers and funeral directors are not required to obey any order made by the coroner which he does not have authority to make. Although this is true, in the interest of justice it is desirable for funeral home directors to cooperate with coroners and report suspicious deaths to coroners before embalming or otherwise mutilating the dead body in order that the coroner may assure jurisdiction.

#### CONCLUSION

It is the opinion of this department that the coroner of McDonald County does not have authority to issue blanket orders or instructions to a funeral home or undertaker to not embalm or otherwise mutilate a body (even though death may be the result of casualty or violence).

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Moody Mansur.

Very truly yours,



NORMAN H. ANDERSON  
Attorney General

Enclosures (opinions): Issued to Waggoner, 12/15/48  
Issued to Rice, 10/10/50

LICENSES:  
DRIVERS LICENSE:  
BREATH TEST:

The revocation of the operators license by the Director of Revenue of one who has refused to take a chemical breath test as provided in Sections 564.441 and 564.444, RSMo Cum. Supp. 1965, should not be rescinded by the court because the offender was subsequently charged with driving while intoxicated under a county or municipal ordinance rather than the state law.

If a person refuses to take the test as provided in Section 564.441, RSMo Cum. Supp., the arresting officer should send a sworn statement to the Director of Revenue as provided in Section 564.444, RSMo Cum. Supp., regardless of what criminal charges are subsequently brought against the driver.

August 11, 1966

OPINION NO. 390

Honorable Daniel V. O'Brien  
Prosecuting Attorney  
St. Louis County  
Clayton, Missouri 63105



Dear Mr. O'Brien:

This is in answer to your request for an opinion in which you ask whether a court may rescind an order of the Director of Revenue revoking the drivers license of a person who has refused to take a chemical breath test as provided in Sections 564.441-564.444, RSMo Cum. Supp., when such person is later criminally charged with driving while intoxicated in violation of a county or municipal ordinance rather than a state law. Your request also inquires as to whether the police officers of a municipality should send a sworn written report to the Department of Revenue requesting the revocation of the license of such a person because of his refusal to take the test as provided by Section 564.444, RSMo Cum. Supp.

Section 564.441, RSMo Cum. Supp. provides in part:

"1. Any person who operates a motor vehicle upon the public highways of this state shall be deemed to have given consent to, subject to the provisions of sections 564.441, 564.442 and 564.444, a chemical test of his breath for the purpose of determining the alcoholic content of his blood if



Honorable Daniel V. O'Brien

arrested for any offense arising out of acts which the arresting officer had reasonable grounds to believe were committed while the person was driving a motor vehicle while intoxicated.\* \* \*  
(Emphasis ours)

The authority of the Director of Revenue to revoke the license of one who refuses to take this test is found in Section 564.444, RSMo Cum. Supp. as follows:

"1. If a person under arrest refuses upon the request of the arresting officer to submit to a chemical test, which request shall include the reasons of the officer for requesting the person to submit to a test and which also shall inform the person that his license may be revoked upon his refusal to take the test, then none shall be given. In this event, the arresting officer, if he so believes, shall make a sworn report to the director of revenue that he has reasonable grounds to believe that the arrested person was driving a motor vehicle upon the public highways of this state while in an intoxicated condition and that, on his request, refused to submit to the test. Upon receipt of the officer's report, the director shall revoke the license of the person refusing to take the test for a period of not more than one year; or if the person arrested be a non-resident, his operating permit or privilege shall be revoked for not more than one year; or if the person is a resident without a license or permit to operate a motor vehicle in this state, an order shall be issued denying the person the issuance of a license or permit for a period of not more than one year. (Emphasis added).

"2. If a person's license has been revoked because of his refusal to submit to a chemical test, he may request a hearing before a court of record in the county in which he resides or in the county in which the arrest occurred. Upon his request the clerk of the court shall notify the prosecuting attorney of the county and the prosecutor shall appear at the hearing on behalf of the arresting officer. At the hearing the judge shall determine only:



Honorable Daniel V. O'Brien

(1) Whether or not the person was arrested;

(2) Whether or not the arresting officer had reasonable grounds to believe that the person was driving a motor vehicle while in an intoxicated condition; and,

(3) Whether or not the person refused to submit to the test.

"3. If the judge determines any issue not to be in the affirmative, he shall order the director to reinstate the license or permit to drive.

"4. Requests for review as herein provided shall go to the head of the docket of the court wherein filed."

If the procedural requirements prescribed in Section 564.444 are satisfied, in our opinion it makes no difference whether the driver is subsequently charged with driving while intoxicated under the state law, Section 564.440, RSMo Cum. Supp., or under a local ordinance or indeed whether criminal charges for driving while intoxicated are ever brought. The revocation of the person's drivers license is for refusing to take the test and is not affected by any subsequent proceedings relating to criminal charges for driving while intoxicated. On this point we enclose a copy of our Opinion No. 69 issued February 8, 1966, to the Honorable Thomas A. David, Director of Revenue, in which we found that the revocation of the operator's license of one who has refused to take a chemical breath test may not be rescinded except for those reasons set out in paragraph 2 of Section 564.444, RSMo Cum. Supp., and is not affected by a subsequent finding of not guilty of a criminal charge of driving while intoxicated under Section 564.440.

For the same reasons set out in the opinion to Mr. David, we think that a court would be incorrect in rescinding the revocation of the drivers license of one who has refused to submit to a chemical breath test because he was subsequently charged with driving while intoxicated under a municipal ordinance.

It may be seen that the legislature contemplated the possibility of a licensee being charged under a county or municipal ordinance, for in Section 564.442, RSMo Cum. Supp., it is stated that the evidence obtained from the chemical breath test is admissible in a trial "of any criminal action or violations of county or municipal ordinances arising out of acts alleged to have been committed by any person while driving a motor vehicle while intoxicated."

Honorable Daniel V. O'Brien

It could not reasonably be said that the legislature intended the results of a chemical breath test to be used in the trial of one alleged to have been driving while intoxicated in violation of county or city ordinances but the sanctions against one refusing to take the test could not be applied if he was later charged with the same county or municipal violations.

In answer to your second question, if a municipal officer arrests a driver for any offense arising out of acts which he had reasonable grounds to believe were committed while the person was driving a motor vehicle while intoxicated and such person refuses to submit to the test, the officer should send a sworn statement to the Director of Revenue containing the information required in the emphasized portion of Section 564.444. This report should be sent regardless of what charge is made against the person as this has no bearing upon the authority of the Director to revoke his license.

Section 564.444-2 provides that the arresting officer should be represented at the hearing by the local prosecuting attorney in appeals in this nature who should vigorously oppose any rescission of the order revoking a drivers license for the reasons discussed herein. If the judge still rescinds the Director's order, the prosecuting attorney should immediately notify the Director of Revenue and this office so that an appeal may be taken if deemed desirable. This is the only way the legality of the judge's actions can be determined. We have sent a copy of the letter requesting this opinion together with this opinion to the Department of Revenue and asked them to notify us when an order of revocation has been rescinded under the circumstances herein.

#### CONCLUSION

The revocation of the operators license by the Director of Revenue of one who has refused to take a chemical breath test as provided in Sections 564.441 and 564.444, RSMo Cum. Supp. 1965, should not be rescinded by the court because the offender was subsequently charged with driving while intoxicated under a county or municipal ordinance rather than the state law.


If a person refuses to take the test as provided in Section 564.441, RSMo Cum. Supp., the arresting officer should send a sworn statement to the Director of Revenue as provided in Section

Honorable Daniel V. O'Brien

564.444, RSMo Cum. Supp., regardless of what criminal charges are subsequently brought against the driver.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John H. Denman.

Yours very truly,



NORMAN H. ANDERSON  
Attorney General

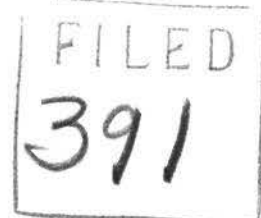
Enclosure (opinion):

No. 69, to David, 2/8/66

November 18, 1966

OPINION NO. 391  
Answered by Letter-Randolph

Honorable William W. Hoertel  
Prosecuting Attorney  
Phelps County  
Rolla, Missouri 65401



Dear Mr. Hoertel:

This letter is in response to your request for an opinion of this office on the question whether a physician attending the birth of a child is required to answer Item 24 of the Missouri Standard Certificate of Live Birth. Said Item 24 reads:  
"Mother married to child's father? Yes ☒ No ☐.

You state that a local physician complains about filling in the information requested in Item 24 on the grounds that he is in no position to know the answer.

We enclose a copy of the opinion of the Attorney General dated May 1, 1953, to Honorable James R. Amos, which is relevant to your inquiry. As stated in the enclosed opinion, the information required in a birth certificate is governed by Section 193.160 RSMo. Many of the items in the certificate form are filled in by the attending physician on the basis of information given him by the mother of the child in question or some other informant, whose name appears in Item 17 of the form. The doctor could not be held responsible for false information given by the informant.

In most instances the doctor has full knowledge or information sufficient to answer Item 24. However it is possible that the doctor does not have such knowledge or the informant gives equivocal information or the doctor is unable for some reason to get information to enable him to answer this item. In this situation

Honorable William W. Hoertel

it is appropriate for the doctor to indicate in Item 24 to see the back of the certificate and thereon give such information as he has or the reason for his lack of information on the subject.

The information given in Item 24, as well as any other information from which illegitimacy of birth can be ascertained, is not a part of the official birth certificate issued to persons by the Division of Health. Such items of information are kept confidential in the files of the Division, to be disclosed only upon order of a court in proper cases; or upon the request of the individual whose birth registration is involved, when such information is necessary to the establishment of any claim against the Federal Government. Section 193.240 RSMo Cum. Supp 1965.

Section 193.100, RSMo, requires the physician in attendance at a birth to file a birth certificate (including Item 24) with the local registrar of vital statistics. Section 193.380 RSMo Cum. Supp. 1965, makes a violation of the preceding section subject to a fine of \$100.

Therefore, it is our view that a physician who attends the birth of a child in Missouri is required to answer Item No. 24 of the Missouri Standard Certificate of Live Birth, provided that when inadequate information is supplied by the mother or other informant, he may answer it on the back of the certificate with a suitable explanation for not answering "yes" or "no".

Very truly yours,

NORMAN H. ANDERSON  
Attorney General

DLR:db

Enclosure (opinion):

Dated 5/1/53, to Amos.

July 26, 1966

Mr. James M. Byrne  
Assistant Prosecuting Attorney  
Jefferson County  
Hillsboro, Missouri 63050



Dear Mr. Byrne:

This is in answer to your letter of recent date in which you ask if it is necessary in printing the ballots for the August Primary Election to place a blank line with a square to the left of the same for the purpose of allowing a voter to write in the name of his choice for any office except that of committeeman or committeewoman.

We are enclosing a copy of an official opinion rendered under date of September 13, 1946 to David W. Hill, Prosecuting Attorney of Butler County, which we believe answers your question. We believe that the conclusion stated in such opinion is valid as of this time. At the time the 1946 opinion was written, the applicable provision regarding write-ins at primary elections was as follows:

"At primary elections at which committeemen or committeewomen of any party are to be elected, in addition to the names of candidates for said offices printed on said ballot, there shall be printed thereon at least one blank line with a square to the left of the same, as hereinbefore specified, for the purpose of allowing the voter to write in the name of his choice for said office." Laws 1945, page 862.

Such section was amended by House Bill No. 2057 of the 65th General Assembly, which House Bill was a revision bill. The explanation given by the Revision Commission concerning what is now Section 120.450, Revised Statutes of Missouri is as follows:



Mr. James M. Byrne

"The only change in substance suggested in section 11560 relates to the last portion of the last sentence which reads 'and no other writing shall be on the back of the ballot except the number of the ballot voted.'"

It will be seen from such explanation that there was no change in substance in such section insofar as such section provided that there could be write-in votes cast and counted only for committeemen and committeewomen. The only other amendment to what is now Section 120.450 was made by another revision bill, Senate Bill No. 75 of the 69th General Assembly. The explanation given in the bill as introduced as to the change in such section was as follows:

"In this section the word 'ballot' is substituted for 'ticket' wherever found. Other minor changes in language are made for purposes of clarity."

The only changes in the sentence relating to write-in votes by Senate Revision Bill No. 75 were to substitute "herein" for "hereinbefore" and to insert the word "that" before the final word "office" in such sentence. It will be seen from the explanations given in the two revision bills amending Section 120.450, that there was no change in the substance of the provision concerning write-in votes. It is therefore our view that the 1946 opinion correctly concluded that there is no authority to write in the name of a candidate for any office at a primary election except for the offices of committeemen and committeewomen and that there is no authority for the printing of a blank line for write-in votes on the primary ballot for any offices except that of committeeman and committeewoman.

Very truly yours,

NORMAN H. ANDERSON  
Attorney General

Enclosure

CBB:aa

August 26, 1966

Opinion No. 394  
Answered By Letter  
(Ashby)



Mr. Henry Maddox, Director  
Division of Commerce and Industrial  
Development  
Eighth Floor - Jefferson Building  
Jefferson City, Missouri 65101

Dear Mr. Maddox:

This letter responds to your inquiry concerning the authority of the Division of Commerce and Industrial Development to administer the funds received under the "State Technical Services Act of 1965" and to disburse these funds to the University of Missouri, St. Louis University, Washington University and Drury College under the provisions of that referenced program.

Public Law 89-182 enacted by the 89th Congress provided, in general, for a state technical aid program to be funded on a matching fund basis with the approved schools matching federal funds either with cash or in-kind services. It is noted that the Act requires only that the federal funds be administered under their rules and regulations.

Your Division was named the "designated agent" to administer and coordinate the program with the appropriate federal counterparts by the Governor in a letter dated June 7, 1966 and addressed to the Office of State Technical Services.

Section 255.051, RSMo Supp. 1965 reads as follows:

"The division may accept any gifts and

Mr. Henry Maddox, Director

grants, including grants from the federal government, relating to any of the functions of the division as described in this chapter."

Under the above statute, you are authorized to accept grants from the federal government relating to any of the functions of your division. These functions are delineated in Section 255.021, RSMo Supp. The purpose of the "State Technical Services Act of 1965" is set forth in Section 1 of the Act. A comparison of the Section 255.021 (supra) and Section 1 of Technical Services Act clearly establishes a similarity of purpose "relating to the functions of the division."

Accordingly, we conclude that under Section 255.051 (supra), and by direction of the Governor, your Division is authorized to administer the State Technical Services program as provided in the "State Technical Services Act of 1965."

Yours very truly,

NORMAN H. ANDERSON  
Attorney General

RCA:mmm

August 11, 1966

OPINION NO. 395  
Answered by letter-Randolph

Honorable Don Witt  
Prosecuting Attorney  
Platte County  
Platte City, Missouri



Dear Mr. Witt:

This letter is in answer to your request for an opinion of this office on the question whether a county court has the authority to levy the special tax mentioned in Section 64.755, RSMo Cum. Supp. 1965, without a vote of the people. Said Section 64.755 reads:

"1. The governing body of any political subdivision may provide, establish, equip, develop, operate, maintain and conduct a system of public recreation, including parks and other recreational grounds, playgrounds, recreational centers, swimming pools, and any and all other recreational areas, facilities and activities, and may do so by purchase, gift, lease, condemnation, exchange or otherwise, and may employ necessary personnel. Funds to be spent for such purposes may be set up in their respective budgets by any governing body.

2. If sufficient funds cannot be made available from ordinary levies, additional funds may be raised by a special tax levy, or bond issue within constitutional limits, but no special tax shall be levied or any bonds issued by any political subdivision unless the rate and purpose of the tax or bond issue is submitted to a vote and a two-thirds majority of the qualified voters voting thereon vote therefor. The rate of such special tax levied by one or more political subdivisions or by cooperating political subdivisions shall not total in the aggregate more than two mills on each one dollar assessed valuation of all real and tangible personal property subject to its or their taxing pow-

Honorable Don Witt

ers. In the event that any political subdivision is now authorized by statute to levy a tax for this purpose the combined levies authorized by such statute and by this section shall not exceed the larger levy authorized." (Emphasis supplied)

The express language of paragraph 2 of Section 64.755, supra, as shown by the underlining requires such a levy to be voted as therein provided; hence we conclude that a county court does not have the authority to levy the special tax mentioned therein without a vote of the people.

Very truly yours,

NORMAN H. ANDERSON  
Attorney General

SAFETY RESPONSIBILITY: The Director of Revenue, under the pro-  
DIRECTOR OF REVENUE: visions of Sections 303.090 and 303.100,  
MOTOR VEHICLES: RSMo, shall suspend the license and regis-  
INSURANCE: tration of a person who had a judgment  
rendered against him resulting from an  
automobile accident, even though this person had a proper liability  
insurance policy of the requisite amount at the time of the accident  
but was unable to satisfy the subsequent judgment resulting therefrom  
because of the failure of the insurance company to meet its obligations.

September 22, 1966

OPINION NO. 396

Mrs. Alice Moore  
Assistant Supervisor  
Safety Responsibility Unit  
Jefferson Building  
Jefferson City, Missouri



Dear Mrs. Moore:

This is in answer to your request for an official opinion of this office concerning the question whether the Director of Revenue should suspend the drivers license and take the automobile license plates of an individual who at the time he was in an automobile accident possessed a liability insurance policy adequate in amount under the state statutes, issued by an insurance company which became unable to fulfill its contractual obligations of payment of any judgment against the insured when a judgment was rendered against him as a result of such accident which judgment he is unable to pay.

The answer to your question involves the construction and application of Chapter 303, RSMo, entitled "The Motor Vehicle Safety Responsibility Law". As the title indicates, the provisions of this act are indicative of the public policy of this state to assure financial remuneration to the extent and under the conditions therein provided for damages sustained through the negligent operation of motor vehicles upon the highways of this state. *Winterton v. Van Zandt*, Mo. Sup., 351 S.W.2d 696.

The first portion of the Act, Section 303.030, RSMo Cum. Sup., provides as follows:



Mrs. Alice Moore

"1. If within twenty days after the receipt of a report of a motor vehicle accident within this state which has resulted in bodily injury or death, or damage to the property of any one person in excess of one hundred dollars, the director does not have on file evidence satisfactory to him that the person who would otherwise be required to file security under subsection 2 of this section has been released from liability, or has been finally adjudicated not to be liable, or has executed a duly acknowledged written agreement providing for the payment of an agreed amount in installments with respect to all claims for injuries or damages resulting from the accident, the director shall determine the amount of security which shall be sufficient in his judgment to satisfy any judgment for damages resulting from such accident as may be recovered against each operator or owner.

"2. The director shall, within forty-five days after the receipt of such report of a motor vehicle accident, suspend the license of each operator, and all registrations of each owner of a motor vehicle, in any manner involved in such accident, and if such operator is a nonresident the privilege of operating a motor vehicle within this state, and if such owner is a nonresident the privilege of the use within this state of any motor vehicle owned by him, unless such operator or owner or both shall deposit security in the sum so determined by the director; provided notice of such suspension shall be sent by the director to such operator and owner not less than ten days prior to the effective date of such suspension and shall state the amount required as security.

\* \* \* \* \*

"4. This section shall not apply under the conditions stated in section 303.070, nor:

(1) To such operator or owner if such owner had in effect at the time of such accident an automobile liability policy with respect to the motor vehicle involved in such accident;

Mrs. Alice Moore

(2) To such operator, if not the owner of such motor vehicle, if there was in effect at the time of such accident an automobile liability policy or bond with respect to his operation of motor vehicles not owned by him;

(3) To such operator or owner if the liability of such operator or owner for damages resulting from such accident is, in the judgment of the director, covered by any other form of liability insurance policy or bond; nor

(4) To any person qualifying as a self-insurer under section 303.220, nor to any person operating a motor vehicle for such self-insurer."

Paragraph 5 sets out the necessary qualifications of the insurance company and the amount of insurance necessary to be acceptable as an automobile liability policy under the Act.

In the situation giving rise to your question, the insured was involved in an accident on May 11, 1964. At that time he had an insurance policy from a St. Louis insurance company which carried liability coverages of \$25,000/\$50,000/\$10,000 which was in effect from February 14, 1964, until August 14, 1964. Suit was filed against the insured, and the insurance company thereafter became unable to fulfill its contractual obligations to the insured who was obliged to defend the suit himself. Judgment was rendered against the insured in the amount of \$551.51 which to date has not been paid. Your question is whether the fact that the insured had a proper liability policy in conformance with the statutory requirements at the time of the accident satisfies the Safety Responsibility requirements of the Missouri Law.

Inasmuch as the security requirements of Section 303.030 relate to the status of the parties before any judgment is rendered and paragraph 4 thereof states that these provisions do not apply to anyone who has an acceptable liability policy it is our opinion that the Director of Revenue could not validly suspend the license or registrations of the insured by reason of Section 303.030 inasmuch as he had a valid liability insurance policy at the time of the accident and thus was excepted from its provisions.

However, in the matter in question, a judgment subsequently was rendered against the one-time-insured in the amount of \$551.51 which is still unsatisfied. The judgment was rendered as a result of the judicially determined negligent operation of his automobile which resulted in damage to the automobile of another.

Mrs. Alice Moore

The legislature has provided in Sections 303.090 and 303.100, RSMo, as follows:

303.090

"1. Whenever any person fails within sixty days to satisfy any final judgment in amounts and upon a cause of action as herein stated, it shall be the duty of the clerk of the court, or of the judge of a court which has no clerk, in which any such judgment is rendered within this state, to forward to the director immediately after the expiration of said sixty days, a certified copy of such judgment."

\* \* \* \*

303.100

"1. The director, upon the receipt of a certified copy of a judgment, shall forthwith suspend the license and registration and any nonresident's operating privilege of any person against whom such judgment was rendered, except as hereinafter otherwise provided in this section and in section 303.130."

\* \* \* \*

As we have stated, the provisions of Section 303.030 are concerned with the requirements of all those involved in an accident prior to the time any party involved is adjudged to be liable. The depositing of security does not depend upon fault but is required of all parties to assure that any of them, if subsequently adjudged negligent, are able to compensate those injured by such negligence.

In our opinion the provisions of Section 303.030 and the exception provided in paragraph 4 thereof do not govern the requirements of Sections 303.090 and 303.100. The former relates to an unascertained liability of an amount not actually determined by judgment, while the latter relates to a definite liability set by a final judgment against that person or persons found to be accountable for the injuries caused by the accident.

The use of the language "This section shall not apply \* \* \*" in paragraph 4 of Section 303.030 is indicative of the intent of the legislature that having a liability policy in effect at the time of the accident only exempts the owner or operator from the provi-

Mrs. Alice Moore

sions of Section 303.030 and not the remainder of the Act and specifically not for the provisions of Section 303.100.

This was the holding of the Court of Civil Appeals of Texas in Department of Public Safety v. Lozano, 323 S.W.2d 316, when this same question was raised. In construing the Texas act which in principle is quite similar to the Missouri law the court, quoting from Jones v. Harnett, 247 App. Div. 7, 286 N.Y.S. 220, 223, (which also dealt with a similar act and reached the same conclusion) said, l.c. 319:

"We are of the opinion that these sections do not relate to the same subject-matter, and that each has an entirely different purpose."

'The title of the section (94-b), "Failure to satisfy judgments; revocation of licenses and security," indicates its purpose. No owner of a motor vehicle, public or private, is excepted. The person who possesses an operator's license is placed in exactly the same category as the one who possesses a chauffeur's license. No exception is made in the case of an owner who has complied with the provisions of section 17 of the Vehicle and Traffic Law. Of course, one readily can understand the hardship the owner of a taxicab or other vehicle covered by the statute may suffer by reason of the failure of an insurance company to meet its obligations, but, on the other hand, his position is no different from that of a private owner who voluntarily and without any legal requirement procures insurance in a company which has been forced into liquidation. The Purpose of the Legislature in enacting section 94-b was to give some aid to unfortunate people who frequently are maimed and disabled as the result of the negligent and careless operation of a motor vehicle. The provisions of section 94-b are mandatory and must be given full force and effect.'"

This also was the holding of the Court in Sheehan v. Division of Motor Vehicles of the State of California, 35 P.2d 359, wherein the

Mrs. Alice Moore

Court had before it the same fact situation and a very similar law. See also 108 A.L.R. 1162, annotations.

While we recognize that an operator or owner may have his license or registrations suspended because, through no fault of his, his insurance company has defaulted upon its obligation to satisfy a judgment against him, it is our opinion that this hardship must be subordinated to the general purpose of the law to require the privilege of operating an automobile upon the highways of this state be withdrawn from those who are not financially able to compensate others who have suffered injuries to their persons or property as a result of his negligence.

#### CONCLUSION

The Director of Revenue, under the provisions of Sections 303.090 and 303.100, RSMo, shall suspend the license and registration of a person who had a judgment rendered against him resulting from an automobile accident, even though this person had a proper liability insurance policy of the requisite amount at the time of the accident but was unable to satisfy the subsequent judgment resulting therefrom because of the failure of the insurance company to meet its obligations.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John H. Denman.

Very truly yours,

A handwritten signature in dark ink, appearing to read "Norman H. Anderson", with a long, sweeping horizontal stroke extending to the right.

NORMAN H. ANDERSON  
Attorney General



INTEREST:

TAXATION

DELINQUENT:

OMITTED PROPERTY:

PUBLIC UTILITIES:

UTILITIES:

Ad valorem taxes on utility property do not become delinquent and the Company subject to penalties provided for nonpayment of delinquent taxes authorized by Section 151.220, RSMo, until the thirty-first day of December next after the same are ascertained

and levied. Taxes on such property are ascertained and levied by the local County Court in those counties in which the property is located as provided in Section 151.440, RSMo, only after the Court has received the certification of the State Tax Commission and the local tax assessors as to the prorated assessed value placed upon the property subject to assessment.

Since the tax on the disputed portion of the distributable property of Kansas City Power & Light Co., and on a disputed addition to its local property subject to assessment in Jackson County in the year 1965, was not certified to the County Court until July, 1966, such taxes are not delinquent nor subject to penalty for nonpayment thereof until January 1, 1967.

December 9, 1966

OPINION NO. 397

Honorable Harlan Moody Murry  
Revenue Department  
Jackson County Courthouse  
Kansas City, Missouri



Dear Mr. Murry:

This is in answer to your question as to the liability of Kansas City Power & Light Company, (the Company) for penalties and interest and the collectors commission for collecting additional assessments made on certain property of the Company located in Jackson County. These additional assessments resulted from an increase in the valuation placed by the State Tax Commission on such property subject to property taxes for the year 1965.

The Company is a public utility and taxes are levied and collected on its property in the manner provided for the taxation of railroad property, Section 153.030, RSMo, which is governed by the provisions of Chapter 151, RSMo, as amended.

There are two different assessments under consideration. The first is on what is known as the distributable property of the Company located throughout the state, including Jackson County. This property initially is assessed by the State Tax



Honorable Harlan Moody Murry

Commission; Section 151.060, RSMo, and the aggregate value apportioned to each county in which the property is located.

The second class of property is the local property of the Company which is assessed by the County Assessor in each county in which such property is located. Section 151.100, RSMo. However, the State Tax Commission is authorized to review such local assessments and, as it did in this case, after a hearing thereon, add omitted property to the local assessment rolls. Section 138.380, RSMo, and Sections 138.460 and 138.470, RSMo.

Considering first the assessment of the distributable property of the Company, the Commission first placed an assessed value on such property of \$99,411,254. After a hearing, the Commission rendered its decision on July 7, 1965, placing a final assessment on the property in the amount of \$96,556,669.

On the same day, the Company filed a petition for review in the Circuit Court of Cole County together with a request for an order staying the certification to the various counties of the Commission's aggregate assessment insofar as it exceeded \$82,240,350. After a hearing and argument, the requested order was issued, and this amount only was apportioned and certified prior to January 1, 1966.

Thereafter, the Commission and the Company entered into an agreement whereby the Commission would place a final assessed value on the Company's distributable property in the amount of \$95,563,797, \$12,323,444 in excess of the amount previously certified to the various counties pursuant to the prior order of the court.

As a result of this agreement, and pursuant to stipulation, the Court entered an order, remanding the case to the Commission which read in part as follows:

"That the Commission's Decision dated April 25, 1966, which is the subject matter of the Petition for Review herein, is hereby vacated and this cause is remanded to the State Tax Commission of the State of Missouri for such further proceedings as it deems appropriate. Court costs herein to be paid by plaintiff."

On the same day after the matter was remanded, the Commission placed a final assessed value on the Company's distributable property in the amount agreed, and apportioned and certified this additional amount to the proper counties.

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Regarding the assessment of the local property, after a hearing held pursuant to Sections 138.460 and 138.470, RSMo, on October 28 and 29, 1965, the State Tax Commission, on November 8, 1965, rendered a decision which found that property which should have been reported and locally assessed under "Construction Work in Progress" in the amount of \$1,590,551.12 had not been placed upon the assessment rolls of Jackson County and directed the County Clerk of that County to spread this amount upon the railroad book tax roll. This order was amended slightly on November 10, 1965, but no change was made as to the decision.

This decision was also appealed to the Circuit Court of Cole County by the Company, which on November 30, 1965, filed three documents: 1) a petition for review; 2) a motion to stay; and 3) a motion to vacate the Commission's decision and order for lack of jurisdiction and for summary judgment.

The motion to stay was granted on December 16, 1965, and the Court entered an order enjoining the enforcement of the decision of the Commission and directed it to notify the County Clerk and County Collector of Jackson County of the order and to direct these officials to refrain from collecting the additional taxes until a final disposition of the proceedings. This was done by letter on December 21, 1965.

The motion to vacate and for summary judgment was argued and was overruled on February 1, 1966.

The Company then filed a supplemental motion for summary judgment on the grounds that the decision and order of the Commission was not properly reached by a quorum of the Commission based upon the evidence. After argument, this motion was sustained by the Court on June 9, 1966, and the cause was remanded to the Commission for further proceedings. This decision was appealed by the Commission to the Missouri Supreme Court.

At the same time of the agreement settling the dispute regarding the distributable property, the parties agreed to accept an additional assessment of local assessed property as "Construction Work in Progress" in the amount of \$795,270. Pursuant to this agreement, the Commission filed with the Circuit Court a notice of withdrawal of its appeal and all parties agreed that the case would then automatically be remanded to the Commission under the terms of the Order of June 9, 1966. Thereafter, on July 25, 1966, the Commission notified the County Collector and Assessor of Jackson County that the Commission fixed an additional assessment on the local property of the Company in the amount of \$795,270, and directed the officials to spread this amount upon the delinquent railroad tax book.

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The penalties for failure to pay taxes are provided by Section 151.220, RSMo Cum. Supp., which reads in part as follows:

"If any railroad company [utility] shall fail to pay to the county collector of the proper county any taxes levied \* \* \*, on the property of the railroad company in the county, on or before the thirty-first day of December next after the same shall have been assessed and levied, to same shall then be, after that date, known and treated as delinquent railroad taxes; and the company shall forfeit and pay, in addition to the taxes with which the company may stand charged on the tax books of the county, such penalty as is provided by law for the nonpayment of other delinquent taxes, which penalty shall be apportioned to the various funds respectively. It shall be the duty of the collector to collect and account for, as other taxes, in addition to all taxes so charged against the company, the penalty aforesaid, on all such taxes after the thirty-first day of December, until the same shall be paid."

Under the statute, taxes do not become delinquent until the thirty-first day of December next after the same shall have been assessed and levied, and penalties thereon do not commence until after that date. Thus, the answer to your question requires a determination of when, under the facts we have stated, the taxes on the local and distributable property of the Company for the year 1965 were assessed and levied.

A quite similar question was before the Missouri Supreme Court in State ex rel. Western Union Telegraph Co. v. Markway, Collector, 341 Mo. 976, 110 S.W.2d 1118. In this case, the telegraph company had in each year, prior to certification by the State Tax Commission of its assessment of the distributable property of the Company for the years 1933, 1934 and 1935, obtained a temporary injunction from the United States District Court against such certification of any amount in excess of the amount which the Company claimed the assessment should be. The Company's suit in Federal Court was ultimately dismissed and the dismissal affirmed by the Circuit Court of Appeals. In October, 1936, the Commission certified to the various counties those portions of the assessment which had been in dispute. On December 9, 1936, the Company tendered the amount of the taxes to the collector of Cole County with the assertion that they did not become delinquent until January, 1937, and that, there-

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fore, no penalties, interest or collector's commissions were due.

Taxes on the property of telegraph companies, as utilities, are by statute, levied and collected in the manner provided by law for taxation of railroad property. The court, acting en banc., in its opinion pointed out that taxes against railroad companies become delinquent if not paid "on or before the first day of January next after the same shall have been assessed and levied". The Court found there was no levy of the disputed portion of the taxes until after they were certified by the Commission in October, 1936, and that they could not become delinquent until January 1, 1937.. The Court also stated that the Company could not be required to pay interest on the amount in dispute.

The present statutes are substantially the same as those considered in the Western Union case. The aggregate value of the distributable property is determined by the Commission and apportioned by certification to the various political subdivisions. Section 151.080. In this case, the additional assessed value of the locally assessable property was placed on the local rolls by the Commission. Neither was done until after the thirty-first day of December, 1965.

The amount of the taxes upon the certified valuations are ascertained and levied by the county court, after receiving an apportioned certification of the value of the assessable property from the State Tax Commission. Section 151.140, RSMo. Within ten days after the county court has levied the proper taxes, the county clerk is required to extend such taxes in the "Railroad Tax Book", Section 151.170, RSMo, which is then delivered to the county collector for collection. Section 151.180, RSMo.

To paraphrase the language of the Court in the Western Union case, l.c. 1120:

Certainly, the various county courts in levying taxes on the assessments in [1965], as certified to them by the State Tax Commission, could not make any levy on those portions of the assessments which were enjoined because they did not have such disputed portions of the assessments before them. No levy upon the disputed portions of the assessments could be made until same were certified to the various counties in [July, 1966]. Section [151.140] requires the levy to be made by the county court each year, and in case any railroad taxes are omitted for any year or years the court is required to make a levy for such year or years, which taxes, when so levied, shall become due and payable, delinquent and subject



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to penalty as other railroad taxes now are, and shall be recoverable as hereinafter provided.

In view of the Court's holding in this case and in the case of State ex rel. Hammer v. Vogelsang, Mo. Sup., 81 S.W. 1087, that when property omitted from taxation is subsequently assessed, the taxes thereon do not become delinquent until after the expiration of the year in which such taxes were actually assessed and that such taxes are not assessed until done so by the county court after receiving a certification from the State Tax Commission, it is our opinion that the taxes on the additional valuation assessed against the property of Kansas City Power & Light Co., will not become delinquent until January 1, 1967.

Although in the Western Union case the Court was concerned only with taxes on distributable property, we believe the ruling therein would also apply to taxes upon local property added to the county assessment rolls by the State Tax Commission.

#### CONCLUSION

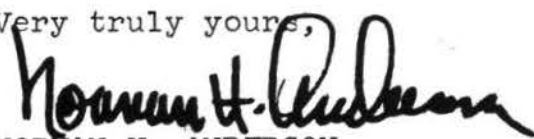
Ad valorem taxes on utility property do not become delinquent and the Company subject to penalties provided for nonpayment of delinquent taxes authorized by Section 151.220, RSMo, until the thirty-first day of December next after the same are ascertained and levied.

Taxes on such property are ascertained and levied by the local County Court in those counties in which the property is located as provided in Section 151.140, RSMo, only after the Court has received the certification of the State Tax Commission and the local tax assessors as to the prorated assessed value placed upon the property subject to assessment.

Since the tax on the disputed portion of the distributable property of Kansas City Power & Light Co., and on a disputed addition to its local property subject to assessment in Jackson County in the year 1965, was not certified to the County Court until July, 1966, such taxes are not delinquent nor subject to penalty for nonpayment thereof until January 1, 1967.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John H. Denman.

Very truly yours,

  
NORMAN H. ANDERSON  
Attorney General

September 6, 1966



Honorable Melvin D. Benitz  
Prosecuting Attorney  
Callaway County Courthouse  
Fulton, Missouri

Dear Mr. Benitz:

Responding to your request for an opinion dated July 27, 1966, respecting interpretation of Section 56.360, RSMo 1959, we enclose herewith a copy of Attorney General's Opinion dated January 7, 1952, to Roy W. McGhee, Jr. which discusses the law in a somewhat analogous situation to the one about which you inquire.

In addition to the statute to which you refer there is also the ethical question which is supervised by the Supreme Court Advisory Committee. We have a copy of the Advisory Committee's Opinion No. 85 in which it rules that it would not be proper for a Prosecuting Attorney to represent a land owner of another county in a condemnation suit brought by the State Highway Commission. We understand that the Committee has informally considered it improper for a Prosecuting Attorney to represent a defendant in a Municipal Court. I would therefore suggest that you might wish to contact Mr. Fred B. Hulse, Chairman, Supreme Court Advisory Committee, Sedalia Trust Building, Sedalia, Missouri, who could give his views on the questions about which you inquire.

Yours very truly,

NORMAN H. ANDERSON  
Attorney General



August 26, 1966

OPINION NO. 404  
Answered by letter-Randolph

Honorable William J. Esely  
Prosecuting Attorney  
Harrison County  
P. O. Box 104  
Bethany, Missouri



Dear Mr. Esely:

This letter is in answer to your request for an opinion of this office on the question whether the County Court of Harrison County has the authority to contribute money to Bethany, Missouri, located within the county, for the purpose of assisting in the resurfacing of the city streets of the square surrounding the Court-house in Bethany. You state that the county owns a portion of the ground used for the city streets.

We enclose a copy of Opinion No. 131, issued May 26, 1966, to Honorable Don Witt, holding that a county court may not expend county general revenue monies for repair of city streets where such streets do not form a part of a continuous county road system.

The ruling in said opinion applies in the instant matter, regardless of ownership by the county of part of the land used for city streets. A use otherwise unlawful for county purposes does not become unlawful by being performed on or in connection with county property. The power of the county court to expend county money is restricted to lawful county purposes which do not include repair or resurfacing of city streets except as stated in the enclosed opinion.

Of course, as is pointed out in Amended Opinion No. 131, 1966, a county may be required to pay its proportionate share of public work improvements.

Very truly yours,

NORMAN H. ANDERSON  
Attorney General

Enclosure:  
Opinion No. 131 (1966)

August 12, 1966

Opinion No. 406  
Answered By Letter  
(Ashby)

Honorable M. E. Morris  
Treasurer, State of Missouri  
Capitol Building  
Jefferson City, Missouri

FILED  
406

Dear Mr. Morris:

This letter is in response to your recent inquiry whether the present contracts "between the State Treasurer and the various state depository banks authorize the payment of a 4% interest rate as of July 20, 1966, the effective date of an amendment to Regulation Q by the Federal Reserve System or whether new contracts will have to be negotiated effective such date."

We assume that the deposits have been regularly made pursuant to and under the standard Depository Contract form that you have employed in the past.

In our Opinion No. 471 dated December 21, 1965, to you, we had an opportunity to comment on the interest provisions of the standard Depository Contract form wherein we said:

"Pursuant to Section 30.260 (3), RSMo 1959, the Contract contains an escalation clause respecting the interest rate that such state deposits shall bear as follows:

"'Second Party agrees to pay to First Party interest on moneys so deposited

Honorable M. E. Morris

with Second Party at the maximum rate which, by federal law or regulation, a bank which is a member of the Federal Reserve System is permitted, from time to time, to pay on such time deposits.'

"A comment at this time on the validity of a contract provision providing for escalation of interest rates appears appropriate. The general rule covering escalating interest rates in a contract is aptly stated in 47 CJS 'Interest' Section 33(b), p. 44, as follows:

"'The parties may enter into a contract by which the rate of interest to be paid shall change whenever the legal rate changes.'

"See also 30 Am. Jur. 'Interests' Section 28, p. 25; Wychoff v. Wychoff (NJ 1888) 13 at 662; Bankers Bond Co. v. Buckingham (Ky. 1936) 97 S.W. 2d 596.

"The fact that there was an effective change of interest rate on December 6, 1965, for Federal Reserve Banks does not change the nature of the deposit or the obligations of the parties in our opinion. It does not constitute a novation as there has been no consent by the state (Hutcheson & Co. v. Providence-Washington Insurance Company, 341 S.W.2d 142, 146).

"The contract contains the following provision respecting termination:

"'Each party reserves the right to terminate this contract at any time on giving thirty (30) days' written notice to the other party of its intention to do so; and this contract shall continue in effect until so terminated.'

"Considering the principles set out above, we believe the obligations of the parties were fully

Honorable M. E. Morris

spelled out in the contract, with the change of interest rates increasing the sum payable by debtor banks for use of state money. Simply put, we believe the banks agreed to accept a sum certain under the contract for the duration of the contract or until terminated on 30 days written notice as provided by the contract. They agreed to pay therefor an interest rate on an escalating scale according to the maximum legal rate set by the Federal Reserve Board."

Having reached this conclusion in the above cited opinion to the effect that the paragraph governing interest rates is an escalating clause which provides for an automatic increase in interest rates when such rates are raised by the Federal Reserve Board, we conclude such interest rates are automatically reduced to "the maximum rate which, by federal law or regulation, a bank which is a member of the Federal Reserve System is permitted, from time to time, to pay on such time deposits."

Accordingly, we hold that your depository contract contains an escalation provision on interest which varies automatically ". . . at the maximum rate which, by federal law or regulation, a bank which is a member of the Federal Reserve System is permitted, from time to time, to pay on such time deposits"; and, secondly, such interest rate operates eo instanti as of the effective time date announced by the Federal Reserve Board. No administrative action or new contracts are believed necessary to accomplish this change of interest rate inasmuch as such change of interest is automatic under the terms and provisions of your Depository Contract form.

Yours very truly,

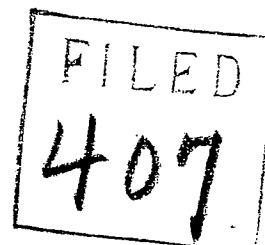
NORMAN H. ANDERSON  
Attorney General

RCA:mm

GOVERNOR: COMPTROLLER: Interpretation of Sections 33.030 and 33.-  
BUDGET: ALLOTMENTS: 290, RSMo, respecting power of the Comptroller  
WORK PROGRAM: and Governor concerning expenditures and  
APPROPRIATIONS: budgetary allotments.

OPINION NO.-407

December 8, 1966



Honorable Warren E. Hearnes  
Governor of Missouri  
Capitol Building  
Jefferson City, Missouri

Dear Governor Hearnes:

This is in response to your recent opinion request in which you posed several questions to this office. The questions presented in your request are as follows:

"A. What authority does the Executive Branch of Government have over all State Government Agencies, Boards, Bureaus, Commissions, and Departments, hereinafter called Agencies, for fiscal control? Are the duties imposed upon the State Comptroller by provisions of Section 33.030, RSMo 1959, subsections (2) and (3), \* \* \* applicable to the claims submitted by these agencies?

B. Does the duties imposed by the above section (33.030) apply to all agencies of state government no matter what the source of revenue appropriations are made from? (For example, General Revenue, Conservation Fund, Highway Fund, etc.)

C. Are these agencies required to follow the line item as shown within the work program submitted by each agency, and when adjusted by the Governor's recommendations, passed by the General Assembly, and signed into law by the Governor?

D. When the appropriation bills read (x) amount of dollars by object, (example, personal service, operations, repairs and replacements, and operations) does the agency have a right to expend this money any way he shall see fit as long as he stays within the total amount appropriated for this object? The agency will have justified this appropriation by line item supporting papers.

Honorable Warren E. Hearn

E. What duty does the State Comptroller have in seeing that all agencies follow the Legislative intent of the General Assembly? (When notified by the State Fiscal Affairs Office of the intent of the General Assembly in writing)

F. Is the State Comptroller's power ministerial or discretionary with each of these agencies? If the State Comptroller's power is discretionary, to what extent?"

This is manifestly a very complex problem. It involves the powers of the Budget Director, the Comptroller and the Governor respecting the whole business of fiscal control of state spending from the building up of the intricate details of the budget to the administration of the finally passed and approved appropriation acts. It is our belief that some confusion arises in some areas of state government out of the failure to clearly distinguish and separate the functions relating to building up the budget, the budget hearings, the hearings before the Legislature on the appropriation acts which, of course, relate directly to the budget and finally the administration of the appropriation acts as finally passed by the Legislature and approved by the Governor.

Reference is made in the inquiry to whether agencies are required to follow the line item as shown within the work program. This appears to be an example of the confusion that exists. As we understand the matter, "line items" have reference to detailed items in the budget. As a result of totaling all of these items in each category of expenditure purpose a total figure is arrived at by the Legislature which constitutes the appropriation act. On the other hand, the work program and the allocations to the departments and agencies is that plan of operations submitted after the appropriation acts are passed and approved. We find nothing in the statutes to indicate that "line items" in the budget are to be equated with work program and allotments. They are separate and distinct, prepared at different times and may or may not be the same.

Relating to question "A", you cited and quoted Section 33.030, (2) and (3), RSMo 1959, which section reads, in its entirety, as follows:

"The division of the budget and comptroller shall:



Honorable Warren E. Hearnnes

(1) Assist the director of revenue in preparing estimates and information concerning receipts and expenditures of all state agencies as required by the governor and general assembly.

(2) Certify approval of the incurring of every obligation for the payment of money and that the expenditure is within the purpose of the appropriation and that there is in the appropriation an unencumbered balance sufficient to pay it. As a prerequisite to certification, the comptroller shall ascertain that the obligation to be incurred is within the work program and budget allotment.

(3) Preapprove all claims and accounts and certify them to the state treasurer for payment. As a prerequisite to his preapproval of claims and accounts, the comptroller shall ascertain that the claims and accounts are regular and correct.

(4) Prepare and report to the governor or to the general assembly or either house thereof when requested any financial data or statistics which he or it requires, such as monthly or quarterly estimates of the state's income and cost figures on the current operations of departments, institutions or agencies."

The Constitution reveals that Section 33.030, supra, embodies language from two separate constitutional provisions. The relevant part of Article IV, Section 22, Missouri Constitution of 1945, reads as follows:

" \* \* \* The division of budget and comptroller shall assist the director of revenue in preparing estimates and information concerning receipts and expenditures of all state agencies as required by the governor and general assembly. \* \* \* " (Emphasis added.)

The above part of Article IV, Section 22, is exactly the language of paragraph (1), Section 33.030, supra.

Honorable Warren E. Hearnese

A relevant part of Article IV, Section 28, states:

" \* \* \* nor shall any obligation for the payment of money be incurred unless the comptroller certifies it for payment and certifies that the expenditure is within the purpose of the appropriation and that there is in the appropriation an unencumbered balance sufficient to pay it \* \* \* "

The above quote is found clearly set out in almost identical language in paragraph (2) of Section 33.030, supra.

Part of Article IV, Section 22 of the Constitution of Missouri, states:

" \* \* \* The comptroller shall be director of the budget and shall preapprove all claims and accounts and certify them to the state treasurer for payment." (Emphasis added.)

The above emphasized part of the quote is identical to the language found in paragraph (3) of Section 33.030, supra. The certification to the state treasurer is, incidentally, the subject of the 1959 amendment to Section 33.030, supra. The certification previously has been to the auditor. Therefore, the amendment has no material relation to the questions you have asked.

While Section 33.030 has application to the questions submitted, a broader question is encompassed in that part of "A" above, which states:

"What authority does the Executive Branch Government have over all State Government Agencies, Boards, Bureaus, Commissions, and Departments, hereinafter called Agencies, for fiscal control?  
\* \* \* "

It is assumed that this question is mainly directed to that part of fiscal control that occurs after the budget is submitted and the appropriation acts are signed into law.

Section 33.290, RSMo 1959\*, is related to Section 33.030, supra. A time-honored rule of construction is that related provisions may be examined in determining the intent and purpose of a particular provision. Chaffin vs. Christian County, Mo., 359 S.W. 2d 730 (1962).

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Section 33.290, in its entirety, states:

"Within two weeks after the approval of the appropriation acts by the governor, each department shall submit to the budget director a work program and requested allotments of appropriations by quarterly periods for the first fiscal year of the biennium. Such requested allotments shall show how the department proposes to classify its expenditures for various purposes and objects of expenditure within each such quarterly period for the fiscal year. Such allotment requests and the allotments as approved shall be in such form and in such detail as the budget director shall direct. Such allotments shall be subject to approval by the governor in such detail as he may determine except that the allotments of the departments not directly under the control of the governor shall be subject to approval only as to the total allotment for each quarter. At the end of any quarterly period any department may make changes in the allotments for the remaining periods upon approval of the governor. At the end of any quarterly period the governor may revise the allotments of any department, and if it shall appear that revenues in any fund for the fiscal year will fall below the estimated revenues for such fund to such extent that the total revenues of such fund will be less than the appropriations from such fund, then and in such case, the governor shall reduce the allotments of appropriations from such fund to any department or departments so that the total of the allotments for the fiscal year will not exceed the total estimated revenue of the fund at any such time. Each such department shall in its requested allotments set aside three per cent of the appropriations as a reserve fund which shall be subject to expenditure only with approval of the governor; provided, that this shall not apply to amounts for personal service to pay salaries fixed by law. On or before June first of the first fiscal year of the biennium, similar work programs and requested allotments of the appropriation for the second fiscal year of the biennium shall be submitted to the budget director. Such requests and allotments shall be subject to the same approval, limitations and changes as those for the first year."

Honorable Warren E. Hearnes

Although somewhat broader, it appears that Section 33.290 is enacted pursuant to the authority of Article IV, Section 27 of the Constitution of Missouri which reads as follows:

"The governor may control the rate at which any appropriation is expended during the period of the appropriation by allotment or other means, and may reduce the expenditures of the state or any of its agencies below their appropriations whenever the actual revenues are less than the revenue estimates upon which the appropriations were based."

In construing the intent and meaning of the Constitution, our Missouri Supreme Court, en banc, has stated in State vs. Neill, (1966) 397 S.W. 2d 666 (l.c. 669):

"The Constitution in general is subject to the same rules of construction as other laws with due regard being given to the broader scope and objects of the Constitution as a charter of popular government, and intent of the organic law is the primary object to be attained in construing it."

The Court, in the Neill case, supra, reiterated the rule for statutory construction, (l.c. 669):

"In determining the meaning and application of statutory provisions, this court must ascertain the legislative intent from the words used, if that is possible, and in doing so give to such words their plain and ordinary meaning so as to promote the object and manifest purpose of the statutes."

Keeping in mind the rules of statutory construction enumerated in the Neill case, supra, especially that the language used is to be given its plain and ordinary meaning, Section 33.290 will now be examined. Because of the language of 33.290 we must keep in mind two categories of departments: (1) those under the direct control of the Governor, and (2) those not directly under the control of the Governor.

The first full sentence of Section 33.290 states:

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"Within two weeks after the approval of the appropriation acts by the governor, each department shall submit to the budget director a work program and requested allotments of appropriations by quarterly periods for the first fiscal year of the biennium. \* \* \* "  
(Emphasis added.)

Each department must submit (1) a work program and (2) a request for an allotment of the appropriations within two weeks after the acts are signed into law. It should be noted that each department shall submit, etc. "Shall" is used in the usual mandatory sense. "Department" refers to all units of state government, except the judicial and legislative branch. Attorney General Opinion No. 3, Atterbury, 2/3/54.

There is nothing to indicate what is meant by "work program" because the term is not defined or explained in the statute.

What is a work program? There is no direction of what a work program should contain or of the detail to be recited therein. Since it is not defined or explained and the only place it is used in Section 33.290, it is used in conjunction with "allotment", hence, we believe that the key to the interpretation of this language is the meaning of "allotment". This section does explain what is meant by allotment and the character and nature of the information and detail that is to be furnished in allotment requests by departments under the direct control of the Governor. The answer would seem to lie in the following analysis. The Governor is the administrative head of his own departments, as well as the chief executive officer of the state. The discretion vested in him by Section 33.290, to require detailed itemization from his own departments, is limited to those departments.

The second full sentence of Section 33.290 states:

"Such requested allotments shall show how the department proposes to classify its expenditures for various purposes and objects of expenditure within each such quarterly period for the fiscal year. \* \* \* "

Appropriation bills generally provide for four categories or objects: (1) Personal Services (2) Additions (3) Repairs and Replacements (4) Operations. This sentence apparently has reference to these categories or objects of expenditures.

The third full sentence of Section 33.290 states:

Honorable Warren E. Hearnes

"Such allotment requests and the allotments as approved shall be in such form and in such detail as the budget director shall direct. \* \* \* "

This sentence directs that these allotments shall be in such detail as the budget director shall require.

The fourth full sentence of Section 33.290 states:

"Such allotments shall be subject to approval by the governor in such detail as he may determine except that the allotments of the departments not directly under the control of the governor shall be subject to approval only as to the total allotment for each quarter. \* \* \* "

This sentence requires each department, under the direct control of the Governor, to submit its allotment requests in whatever detail the Governor may require. Since the Governor has, by this provision, the power of approval of such allotments it must be concluded that the Governor has the power of disapproval of the allotments requested by departments directly under the Governor's control. However, it is equally clear that the Governor does not have a like authority over departments not directly under his control. In departments not under his direct control, the Governor is authorized to approve or disapprove the allotment request only as to total and not as to detail.

At this point it would be pertinent to show the relationship of Section 33.030, supra, to that part of Section 33.290 which has been discussed to this point. The last full sentence of Section 33.030 (2) mandatorily requires the Comptroller, as a prerequisite to certification of approval, to ascertain that the obligation to be incurred is within the work program and budget allotment. The work program so referred to is the same work program mentioned in the first sentence of Section 33.290. The budget allotment referred to in Section 33.030 (2) is a reference to the allotment of appropriation approved by the Governor, referred to in the fourth sentence of Section 33.290, supra. The General Assembly has provided a standard by which the Comptroller, pursuant to Section 33.030 (2), can determine whether or not the obligation to be incurred is within the purpose of the appropriation. This is to be accomplished by the Comptroller looking to the work program and the approved allotment required by Section 33.290. If the department has failed to include the purpose or object of the obligation, then the Comptroller could disapprove the requisition and withhold his certification.



Honorable Warren E. Hearnes

The language of Section 33.030 (2) indicates the purpose of that paragraph is to require certification by the Comptroller before the obligation is incurred that the obligation is within the work program and the allotment. A failure to approve at this stage prohibits the department from placing the order by which a debt would accrue.

#### Departments Not Under the Control of the Governor

What is the authority of the Comptroller over departments not under the direct control of the Governor and who are not required to detail their allotment requests? These departments receive approval only as to total allotment. With respect to departments not under the Governor's control, Section 33.030 (2) requires the Comptroller to ascertain that the proposed expenditure is within the total allotment for the categories or objects--Personal Services, Additions, Repairs and Replacements, and Operations. Since the request for allotments does not need to be detailed, it would follow that the work program would, as a correlation, not be any more detailed than the allotment request.

The discretion vested in the Budget Director and the Comptroller by the third full sentence of Section 33.290, supra, is that given to the Governor by that part of Article IV, Section 27, which states:

"The Governor may control the rate at which any appropriation is expended during the period of the appropriation by allotment or other means, \* \* \* " (Emphasis added.)

The Comptroller, on behalf of the Governor, can exercise only that power which is enumerated in terms of controlling the rate of appropriation expenditure. Perhaps "or other means" needs to be construed. Since the framers of the Constitution indicated that special power of allotment was one form of authorized control, and state no other example, they obviously were thinking of some other method similar to allotment. This construction is consistent with the holding in Kroger Grocery & Baking Co. vs. City of St. Louis, Mo., 106 S.W. 2d 435 (1937). In the Kroger case, supra, the court stated, (l.c. 439):

" \* \* \* when special powers are conferred, or special methods are prescribed for the exercise of a power, the exercise of such power is within the maximum expressio unius est exclusio alterius, and 'forbids and renders nugatory the doing of the thing specified, except in the particular way pointed out.' "

Honorable Warren E. Hearnes

Departments Deemed Not Under the Direct Control of the Governor

It appears desirable to comment on departments which are deemed under the direct control of the Governor and departments which are not. Section 33.290 uses the language "Departments not directly under the control of the Governor." We believe the use of the word "directly" is significant. It is clear that elected state offices are not directly under the control of the Governor. These are:

Lieutenant Governor - Section 26.020  
Secretary of State - Section 28.030 (4)  
Auditor - Section 29.040  
Treasurer - Section 30.120  
Attorney General - Section 27.020

In addition there are three departments that are made separate and distinct by the Constitution. They are:

Highway Commission - Article IV, Section 29,  
Constitution of Missouri  
Conservation Commission - Article IV, Section  
42, Constitution of Missouri  
Board of Curators of the University of Missouri -  
Article IX, Section 9(a), Constitution of  
Missouri.

These departments are not under the direct control of the Governor because they are responsible to the Legislature and to the people. This intent is manifest by the following discussion at the Constitutional Convention between McReynolds and Brown. "Debates of the Constitutional Convention", One Hundred Sixty-Sixth Day.

"MR. BROWN (OF CHRISTIAN): Senator, is it your idea that where the Legislature makes an appropriation, say for the Attorney General for instance, that this Comptroller should have the right to tell the Attorney General how to spend that money within his appropriation?

"MR. McREYNOLDS: No, I don't think so. I don't think he would undertake to do that."

In addition, there are a large number of Departments, Boards and Agencies which function in various manners pursuant to statute, usually under the supervision of a Board and most often the Board appointed by the Governor. These include the following:

Honorable Warren E. Hearnnes

State Board of Accountancy - Section 326.180  
State Board of Registration for Architects and Professional Engineers - Chapter 327  
State Board of Barber Examiners - Section 328.040  
State Board of Cosmetology - Section 329.180, 329.210, 329.230  
State Board of Chiropractic Examiners - Section 391.090, 391.100  
State Board of Chiropodists - Section 330.140, 330.190  
Missouri Dental Board - Section 332.310  
State Board of Embalmers and Funeral Directors - Section 333.095  
State Board of Registration for the Healing Arts - Section 334.123  
State Board of Nursing - Section 335.150  
State Board of Optometry - Section 336.140, 336.150  
State Board of Pharmacy - Section 338.130  
Missouri Real Estate Commission - Section 339.120  
Missouri Veterinary Medical Board - Section 340.140  
Industrial Commission  
Water Resources Board  
Oil and Gas Council  
Water Pollution Board  
State Library Board  
Department of Education  
Human Rights Commission  
Lincoln University  
State School for the Blind  
State School for the Deaf  
Commission of Higher Education  
Arts Council  
State Tax Commission  
Commerce and Industrial Development Commission  
State Banking Board  
Division of Mental Diseases  
Board of Probation and Parole  
Board of Training Schools  
Soil and Water Districts Commission  
Air Pollution Board  
Board of Mediation  
Atomic Energy Commission  
Boat Commission  
Reciprocity Commission  
Outdoor Recreation Council  
Public School Retirement Board  
State Retirement Board  
State Colleges

Honorable Warren E. Hearn

The foregoing probably lists most all of the Boards, Commissions and Agencies which fall in this category, however, it is not intended to be all inclusive nor exclusive of others which might properly fall in this category.

While in practical effect many of these Boards and Agencies are subject to the control of the Governor, we believe that a fair construction of the intent and meaning of Section 33.290 can only mean that these Boards, Commissions and Agencies are not "directly" under control of the Governor and therefore fall within the exception in the fourth sentence of Section 33.290.

Departments, Divisions and Agencies Deemed  
Under the Direct Control of the Governor

Likewise it appears desirable to comment on the Departments, Divisions and Agencies which are deemed under the direct control of the Governor because the administrative head of each is directly appointed by and serves at the will of the Governor. These appear to include the following:

- Division of Public Buildings
- Department of Revenue
- Office of Economic Opportunity
- Department of Agriculture
- Division of Finance
- Division of Insurance
- Division of Savings and Loan Supervision
- Division of Employment Security
- Department of Public Health and Welfare
- Division of Welfare
- Division of Health
- Department of Civil Defense
- Department of Corrections
- Department of Liquor Control
- Division of Budget and Comptroller
- Department of Adjutant General
- Division of Industrial Inspection
- Division of Mine Inspection
- Division of Workmens Compensation
- Division of Procurement
- Department of State and Regional Planning and Community Development

Here again the foregoing list probably includes most of the Departments, Divisions and Agencies which fall in this category, however, it is not intended to be all inclusive nor exclusive of others which might properly fall in this category.

Honorable Warren E. Hearnnes

It would therefore appear that when the Comptroller is exercising his authority set out in Section 33.030 (2) he could not withhold approval of a request, to incur a debt, from a department not under the control of the Governor because the object or purpose of the debt was not specifically detailed or enumerated in a work program or an allotment request. In this instance the Comptroller would only pass on whether the appropriation act authorized money for the particular category, i.e., personal services, repairs and replacements, etc. However, if such an obligation would cause a deficiency in the allotment, then the request must be disapproved because of the other requirements of Section 33.030 (2).

The words "approved" or "approval", when used in a statute requiring that a certain act meet with some designated approval, may merely contemplate the doing of a purely ministerial act. Boyes vs. Bank of Caruthersville, Mo. App., 118 S.W. 2d 1051 (1938). In the context of Section 33.030, supra, the acts contemplated of the Comptroller are ministerial. The only judicial decision in Missouri has so held, and in State ex rel Kresge Co. vs. Howard, Mo., 208 S.W. 2d 247 (1947) the court stated (l.c. 249):

"Accordingly, under the facts presented there is no occasion for the exercise of any discretion on his (comptroller) part, and if the appropriation is valid it becomes his positive ministerial duty under the law to perform the necessary acts for the payment of the claim."

#### CONCLUSION

It is the opinion of this office that:

1. The Governor can require departments directly under his control to submit allotment requests for funds for quarterly period in such detail as he shall deem proper and such allotments are valid only when approved by the Governor.

2. The Comptroller can approve requests for expenditures by departments directly under the Governor's control only if such expenditures are listed in the quarterly allotments approved by the Governor.

3. The Governor cannot require departments not directly under his control to submit allotment requests setting out proposed expenditures in detail but his only power insofar as such departments are concerned is to determine the amount of each quarterly allotment.


Honorable Warren E. Hearn

4. The Comptroller has no authority to disapprove requests for expenditures by departments not directly under the Governor's control except when the expenditure is not within the purpose of the appropriation or when there are not sufficient unencumbered funds in the appropriation to pay for such expenditure.

5. The Comptroller has no power insofar as departments not under the control of the Governor are concerned to deny requests for expenditures because such requests allegedly are not in compliance with the Comptroller's understanding of the intent of the General Assembly in passing appropriation laws except as set out in such appropriation laws or because such requests allegedly are not in compliance with the intent of the Governor in making quarterly allotments to such departments.

The foregoing opinion, which I hereby approve, was prepared by my Assistants, William A. Peterson and J. Gordon Siddens.

Very truly yours,

  
NORMAN H. ANDERSON  
Attorney General

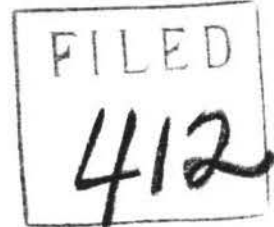


GENERAL ASSEMBLY: Article III, Section 12, Missouri Constitu-  
TEACHERS: tion 1945, prohibits teachers and other  
SCHOOLS: employees of (1) a junior college operated  
STATE UNIVERSITY: by a public school district, (2) a junior  
JUNIOR COLLEGES: college district, or (3) the state university  
from holding the office of state senator or  
representative.

OPINION NO. 412

October 25, 1966

Honorable John A. Grellner  
State Representative  
Ninth District, St. Louis County  
7446 Richmond  
Maplewood, Missouri 63143



Dear Representative Grellner:

This opinion is issued in response to your request for an official ruling on the question of whether or not a member of the general assembly can lawfully, at the same time, be a teacher of a junior college district or of the University of Missouri or its branches.

Article III, Section 12, Missouri Constitution 1945, provides:

"No person holding any lucrative office or employment under the United States, this state or any municipality thereof shall hold the office of senator or representative. When any senator or representative accepts any office or employment under the United States, this state or any municipality thereof, his office shall thereby be vacated and he shall thereafter perform no duty and receive no salary as senator or representative. During the term for which he was elected no senator or representative shall accept any appointive office or employment under this state which is created or the emoluments of which are increased during such term. This section shall not apply to members of the organized militia, of the reserve corps and of school boards and notaries public."

This office has previously considered this constitutional provision and ruled that a teacher employed by a public school district may not hold legislative office. Opinion No. 365,

Honorable John A. Grellner

Michaelson, 9-9-63. Opinion No. 365 was recently reconsidered at length by this office. Enclosed is a copy of Opinion No. 16, Proffer, 2-25-66.

There are two forms of junior colleges existing under the laws of this state. Any public school district with a fully accredited high school may provide for two-year college courses with the approval of the State Board of Education. Section 178.370, RSMo Supp. 1965. Teachers in junior colleges operated by public school districts are clearly within our ruling as expressed in Opinion No. 16, supra.

Junior colleges may also be operated by a special junior college district organized for that purpose. Sections 178.770 et seq., RSMo Supp. 1965. Under Section 178.770, a junior college district is a body corporate and a subdivision of the State of Missouri. Based on the authorities cited in Opinion No. 16, to Proffer, we are of the opinion that junior college districts are municipalities within the meaning of Article III, Section 12, of the Constitution.

Therefore teachers and other employees of junior college districts cannot hold the office of state senator or representative.

You further inquire as to employees of the state university and its branches. The State Constitution, Article IX, Section 9(b), obligates the general assembly to adequately maintain the state university. The state university exists under authority of this state. Teachers and other employees are paid out of state-appropriated and other public funds.

We note that the university is a corporate body. Section 172.020, RSMo 1959. Therefore, it can be said that employees of the university are not directly employees of the state. However, as we noted in Opinion No. 16, the phrase "employment under . . . this state" has a broader meaning than the phrase "employment of this state."

Since employment with the state university is juridically and financially created and maintained by the state, we are of the opinion that teachers and other employees of the state university hold an "employment under . . . this state" within the meaning of Article III, Section 12, of the State Constitution.

Honorable John A. Grellner

CONCLUSION

Therefore it is the opinion of this office that Article III, Section 12, Missouri Constitution 1945, prohibits teachers and other employees of (1) a junior college operated by a public school district, (2) a junior college district, or (3) the state university from holding the office of state senator or representative.

The foregoing opinion, which I hereby approve, was prepared by my assistant Louis C. DeFeo, Jr.

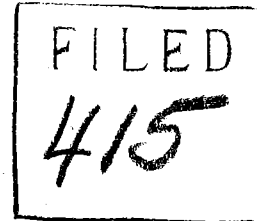
Yours very truly,

  
NORMAN H. ANDERSON  
Attorney General

Enclosure: Opinion No. 16,  
Proffer, 2-25-66.

OPINION NO. 415  
Answered by Letter (Siddens)

October 26, 1966



Honorable Thomas D. Graham  
Speaker, House of Representatives  
Jefferson City, Missouri

Dear Mr. Graham:

This is in response to your request for an opinion relating to the reapportionment of the City Council of the City of Jefferson. We have observed by the local press that the City Council of the City of Jefferson has decided to reapportion the City Council Districts based upon the 1960 Federal Decennial Census. In the light of this decision it appears that the problem has become moot.

We do however wish to say that we have done considerable research on this problem and have been unable to find any law which precisely deals with the problems which you raise particularly with respect to prisoners and students. While it is possible that some court faced with the precise facts involved in the Jefferson City situation might hold that such population does not have to be considered in apportionment of city councils, nevertheless the courts in general have held that representatives of the people represent people and not voters. We therefore, think that the safest procedure is, as we are informed the Council has decided to do, that is, be governed by the last available federal census.

Yours very truly,

NORMAN H. ANDERSON  
Attorney General

September 20, 1966



Honorable James L. Paul  
Prosecuting Attorney  
McDonald County Courthouse  
Pineville, Missouri 64856

Dear Mr. Paul:

This is in answer to your recent correspondence regarding whether or not the county court is liable for the examination in a state mental hospital of an indigent accused, charged with first degree murder, made pursuant to the provisions of Chapter 552.

This question has been covered rather extensively in the enclosed opinions which are, respectively, to Don E. Burrell, dated January 29, 1965 (Opinion No. 13), Dr. George A. Ulett, January 27, 1966 (Opinion No. 15), and Claude E. Curtis, January 27, 1966 (Opinion No. 56).

You did not state whether or not the accused was examined under Section 552.020, RSMo Supp. 1965, or under Section 552.030, RSMo Supp. 1965, or whether there was a final determination of the case. For the purposes of your question, however, these particulars are not determinative.

Obviously, since the accused in this instance is charged with murder in the first degree and is indigent, the State of Missouri will ultimately bear the liability, if such costs are taxed upon application as provided under Section 552.080, RSMo Supp. 1965. The State's liability would be based upon the provisions of Section 550.020 RSMo, pertaining to convicted indigents, or under Section 550.040 RSMo, pertaining to acquittal in capital and cases in which imprisonment in the penitentiary is the sole punishment. The county's liability for costs upon acquittal in other trials is also contained in Section 550.040, and for the

Honorable James L. Paul

conviction of indigent persons, in Section 550.030.

As we noted, Section 552.080 provides for the taxation of such costs by the trial court.

Your letter indicates that the statement of expenses for the period of observation was sent to the county court and this would be improper inasmuch as the county would have no legal responsibility for this type of expense under these circumstances.

Yours very truly,

NORMAN H. ANDERSON  
Attorney General

JCK:df

Enclosures:

Opinion No. 13, Burrell, 1/29/65;  
Opinion No. 15, Ulett, 1/27/66; and  
Opinion No. 56, Curtis, 1/27/66.



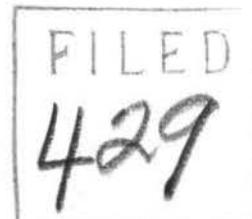
ARCHITECTS-REGISTRATION:  
RECIPROCAL REGISTRATION-ARCHITECTS:  
STATE BOARD OF ARCHITECTS AND  
PROFESSIONAL ENGINEERS:  
OUT-STATE REGISTRATION-ARCHITECTS:

A resident of Missouri or elsewhere may apply to State Board of Architects and Professional Engineers of Missouri for architectural registration upon proof he is a duly registered and qualified architect in good standing in other state, provided that other state has similar registration requirements and recognizes Missouri's registrations.

November 1, 1966

OPINION NO. 429

Mrs. Olean Barton, Acting Secretary  
State Board of Architects and  
Professional Engineers  
Box 184  
Jefferson City, Missouri



Dear Mrs. Barton:

We are in receipt of your letter of August 17, 1966, wherein you requested an opinion from this office as to whether comity or reciprocity applies only to non-residents of Missouri seeking architectural registration in this State.

This opinion request was further clarified by our telephone conversations of September 21, 1966 and October 19, 1966 to the effect that the Board desired a ruling on the following question:

"Can a former resident of another state who has become a resident of Missouri, be registered in this state upon satisfactory proof that he is a duly registered and qualified architect and in good standing in the State of his former residence?"

Section 327.030 RSMo., 1959, provides that any citizen of the United States over the age of 21, of good moral character shall be registered by the Board, upon payment of the required fee, if he shall claim in his application and show to the Board that he is qualified under any of the following sub-divisions of this section. Sub-division (3) is as follows:

"(3) That he is qualified for registration under any rule of comity or reciprocity on the filing of the official certificate of another state registration authority showing that he is qualified for registration under any such rule."

Section 327.100 RSMo., 1959, provides:

"Exchange or reciprocal registration may be granted to any registered architect \* \* \* of another state, \* \* \* on the same terms and under the same conditions as the officer or officers of such state \* \* \* authorized by law to register architects \* \* \* will grant exchange or reciprocal registration to a resident architect \* \* \* registered by the Board; provided, the qualifications and experience of the applicant, as shown by the certificate of the registering authority of such other state \* \* \* are equivalent to the requirements for initial registration in this state."

"(2) The board is hereby authorized to negotiate and effect arrangements with the appropriate officers of other states \* \* \* to facilitate such exchange or reciprocal registration."


The substance of these three sections quoted above is to the effect that any citizen of the United States over the age of 21, regardless of residency, shall be registered by the State Board of Architects and Professional Engineers of Missouri, if he has qualified for registration and files the official certificate of the state of his former residence with the Board and provided that the state in question has similar registration requirements, and recognizes Missouri's registrations in reciprocity.

#### CONCLUSION

In conclusion, it is our opinion that a resident of Missouri or of any other state may apply to the State Board of Architects and Professional Engineers of Missouri, for architectural registration upon satisfactory proof that he is a duly registered and qualified architect in good standing in any other state, provided that said state has similar registration requirements and that said state recognizes Missouri's registrations in a similar manner.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, O. Hampton Stevens.

Yours very truly,

  
NORMAN H. ANDERSON  
Attorney General

CIGARETTE TAX: "Bravo's" are cigarettes made from a substitute for tobacco and are subject to the cigarette tax imposed by Chapter 149, RSMo.

OPINION NO. 431

September 15, 1966

Mrs. Frances Ferris  
Supervisor, Cigarette Tax Division  
Department of Revenue  
Jefferson Building  
Jefferson City, Missouri



Dear Mrs. Ferris:

This is in answer to your request for an opinion on the question of whether "Bravo's" are subject to the cigarette tax. We have examined a pack of "Bravo's" and find they are in appearance the same as cigarettes made from tobacco except that they are made of treated lettuce instead. They are also smoked the same as tobacco cigarettes. The following is printed on the back of the Bravo pack:

"Welcome to the pleasure of nicotine-free smoking

"Medical authorities agree nicotine is the most harmful ingredient in tobacco. It causes significant increases in blood pressure, heart rate. It constricts the blood vessels.

"BRAVO IS GUARANTEED 100% NICOTINE-FREE.

"Instead of tobacco, Bravo contains wholesome leaf of Lactuca Sativa, a variety of lettuce, treated by a patented process to assure smoking pleasure and satisfaction.

"As you know, it takes a few packs to become accustomed to any new brand. When you discover the full pleasure of nicotine-free Bravo--and the lack of morning taste--you may ask, as others have... 'Who ever thought a no-nicotine smoke could taste so great?'"

Mrs. Frances Ferris

Subsection 1 of Section 149.020, RSMo Supp. 1965, reads as follows:

"A tax shall be paid on the sale of cigarettes made of tobacco, or any substitute for tobacco, of two mills per cigarette."

The legislature did not define the word "cigarette" but as said in State v. Goodrich, 133 Wis. 242, 113 N.W. 388, 389, "the Legislature used that word to describe some well known, recognized, and definite article."

In that case the court was considering a criminal statute outlawing cigarettes and quoted from Kappes v. City of Chicago, 119 Ill. App. 436, the following, 1.c. N.W. 390:

"\* \* \* We think the court may take judicial notice that cigarettes are generally made of tobacco rolled within small pieces of tissue paper."

The court then said, 1.c. N.W. 390:

"Further, all lexicographers agree that the paper wrapped rolls of tobacco are cigarettes, though they differ as to whether the word may also include similar rolls wrapped in tobacco."

\* \* \* \* \*

"As appears by uncontradicted evidence, what is generally termed a 'cigarette' in the tobacco trade has, as its special characteristics, the paper wrapper and the peculiar kind and quality of tobacco, which is distinguished by its light color and mildness. \* \* \*"

From the above it would appear that a cigarette is a roll of tobacco wrapped in thin paper to be smoked.

The legislative purpose in the cases from which these definitions have been taken was to outlaw cigarettes made from tobacco because of the apparently undesirable and harmful effects of nicotine found in tobacco.

The purpose of the legislature in enacting Chapter 149, RSMo, was not to outlaw cigarettes but to raise revenue by taxing a certain product. No legislative intent can be found in Chapter 149 that

Mrs. Frances Ferris

cigarettes are being taxed because tobacco is harmful. The legislature in fact defines the subject of the tax as a "cigarette made of tobacco, or any substitute for tobacco."

Webster's Third New International Dictionary defines cigarette as:

"\* \* \* 1 a: a tube of finely cut tobacco enclosed in paper, designed for smoking, and usu. narrower and shorter than a cigar    b: a similar tube for smoking filled wholly or partly with some substance other than tobacco \* \* \*"

Webster's Third New International Dictionary also defines substitute as:

"\* \* \* 2: something that is put in place of something else or is available for use instead of something else \* \* \*"

It is our opinion that "Bravo's" are cigarettes which are the subject of taxation of Chapter 149, RSMo. The material used in "Bravo's" is a substitute for tobacco. "Bravo's" are designed to do the same thing as cigarettes made from tobacco but without the allegedly harmful substance nicotine. The message printed on the back of the Bravo pack best illustrates that "Bravo's" are cigarettes made from a substitute for tobacco when it says:

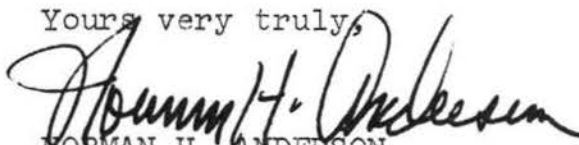
"Instead of tobacco, Bravo contains wholesome leaf of Lactuca Sativa, a variety of lettuce, treated by a patented process to assure smoking pleasure and satisfaction."

#### CONCLUSION

It is the opinion of this office that "Bravo's" are cigarettes made from a substitute for tobacco and are subject to the cigarette tax imposed by Chapter 149, RSMo.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Walter W. Nowotny, Jr.

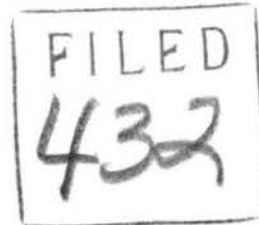
Yours very truly,

  
NORMAN H. ANDERSON  
Attorney General

August 22, 1966

Opinion No. 432  
Answered By Letter  
(Mansur)

Honorable James C. Kirkpatrick  
Secretary of State  
State Capitol  
Jefferson City, Missouri



Dear Mr. Kirkpatrick:

This is in reply to your letter of August 18, 1966, requesting an official opinion from this office as to whether the Nominating Petition submitted by Edward Verburg as an independent candidate for Representative from the 18th Missouri District complies with the statutes governing the nomination of independent candidates for public office.

Section 120.180, RSMo 1959 requires the Nominating Petition of an independent candidate for public office to be signed in the aggregate by the qualified voters of the district equaling not less than two per cent of the number of persons who voted at the next preceding general election in such district or political subdivision for the election of officers to serve its respective territorial area. The Nominating Petition submitted is signed only by Edward Verburg and does not contain the signatures of any other qualified voter in the territorial area.

It is the opinion of this office that the Nominating Petition submitted by Edward Verburg as a candidate for Representative in the General Assembly from the 18th Missouri District does not comply with the statutory requirements of Section 120.180, RSMo 1959, and should not be acceptable for filing in your office.



Honorable James C. Kirkpatrick

We are returning herewith the Petition of Mr. Edward Verburg  
which you forwarded to us.

Very truly yours,

NORMAN H. ANDERSON  
Attorney General

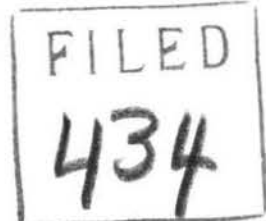
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Enclosure: 1

OLDER AMERICANS ACT:  
FEDERAL-STATE AGREEMENTS:  
CERTIFICATION OF AMENDED STATE PLAN  
FOR EFFECTIVE SERVICES TO OLDER MISSOURIANS;

Opinion No. 434  
Answered by Letter(DeFeo)

August 25, 1966



The Honorable John W. Gardner, Secretary  
Department of Health, Education and Welfare  
Washington, D. C.

Dear Secretary Gardner:

At the request of Mr. Robert C. Linstrom, Director of the Division on Aging of the Office of State and Regional Planning and Community Development, this office has reviewed the Missouri State Plan for effective services to the Older Missourian together with the Older American Act of 1965 (P.L. 89-73), and the letter of Governor Warren E. Hearnes to John W. Gardner, Secretary, United States Department of Health, Education and Welfare, dated May 31, 1966, in which the office of State and Regional Planning and Community Development was designated the State agency for participation under the Older Americans Act and also, Senate Bill No. 14, Second Extra Session, 73rd General Assembly (Chapter 251 RSMo) which establishes the State Planning Office.

Based on the foregoing, it is our judgment that the Office of State and Regional Planning and Community Development of the State of Missouri has been designated as the sole State agency responsible for administering the Amended State Plan, that the State Planning Office has the authority to submit the State Plan and to carry out the program therein and that nothing in the State Plan is inconsistent with the provisions of State law.

Further, we are of the opinion that the Office of State Planning has the authority to carry out the seven functions of the Division of Aging described in the letter of Governor Hearnes, to wit:

Coordination of state and federal programs for the aging;  
development of state and local program and services for the aging;  
consultation to local communities and other state departments in

The Honorable John W. Gardner, Secy - 2

regard to programs for the aging; compiling and disseminating up-to-date information about the elderly in our state; administering the program of grants to local communities as provided for in Title III of the Older Americans Act of 1965; stimulating citizen interest and increasing public knowledge about aging; and recommending needed state legislation relating to the field of aging.

Very truly yours,

NORMAN H. ANDERSON  
Attorney General

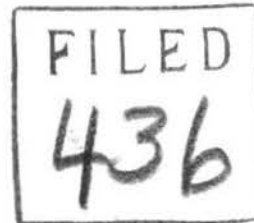
By Louis C. DeFeo, Jr.  
Assistant Attorney General

LCD:df

August 30, 1966

OPINION NO. 436  
Answered by Letter  
(Mansur)

Honorable James C. Kirkpatrick  
Secretary of State  
Capitol Building  
Jefferson City, Missouri



Dear Mr. Kirkpatrick:

This is in reply to your letter of August 26, 1966, concerning the Nominating Petition filed in your office by Edward Verburg, as an independent candidate for representative from the 18th Legislative District and the Nominating Petition of Mrs. Rosemary Flemington, as an independent candidate for Representative in the General Assembly from the 5th Legislative District, each legislative district being within the boundaries of Jackson County, Missouri.

You inquire whether the names of the above candidates should be included in your certification to the county clerks of nominees for public office. We have now been informed that Mrs. Flemington has requested her name to be omitted.

It is our opinion that under Section 120.220, RSMo 1959, the Nominating Petition of a candidate for representative from a legislative district, the boundaries of which are within one county, should be filed with either the county clerk or the board of election commissioners. Since the 18th Legislative District is within the boundaries of Jackson County, the petition should not have been filed in your office and you should not include the name of Mr. Verburg in your certification.

Our opinion on this matter, renders the other question you submitted concerning the signatures immaterial at the present time.

Very truly yours,

NORMAN H. ANDERSON  
Attorney General

CITIZENSHIP-CITIZENS:  
LICENSES:  
PROFESSIONAL ENGINEERS:  
REGISTERED ENGINEERS:  
STATUTORY CONSTRUCTION:

Exchange or reciprocal registration may be granted to an applicant under Section 327.100, RSMo, if he meets the requirements set forth therein even if the applicant is not a citizen of the United States or Puerto Rico.

December 13, 1966

OPINION NO. 437

Mrs. Olean Barton, Acting Secretary  
State Board of Registration for  
Architects and Professional Engineers  
Box 184  
Jefferson City, Missouri



Dear Mrs. Barton:

This is in answer to your request for an opinion of this office as to whether a person who is not a citizen of the United States may be registered by the State Board of Registration for Architects and Professional Engineers (the board) under the provisions of Section 327.100, RSMo.

The basic provisions authorizing the registration of architects and professional engineers in this state are set forth in Section 327.030, RSMo. Paragraph 2 of this section provides:

"2. Any citizen of the United States of America, Alaska, Hawaii or Puerto Rico, over the age of twenty-one years and of good moral character, shall be registered by the board, on recommendation of its professional engineering division and payment of the fee required by law, if he shall claim in his application to be, and show to the satisfaction of the professional engineering division that he is, qualified for such registration under any of the following subdivisions of this subsection:

\* \* \* \*

(3) That he is qualified for registration under any rule of comity or reciprocity on the filing of the official certificate of

Mrs. Olean Barton

another state registration authority showing that he is qualified for registration under any such rule."

Additional provisions authorizing reciprocal registration of engineers are found in Section 327.100, RSMo, as follows:

"1. Exchange or reciprocal registration may be granted to any registered architect or registered professional engineer of another state, territory or possession of the United States or of any country, on the same terms and under the same conditions as the officer or officers of such other state, territory, possession or country, authorized by law to register architects and professional engineers, will grant exchange or reciprocal registration to a resident architect or professional engineer registered by the board; provided, the qualifications and experience of the applicant, as shown by the certificate of the registering authority of such other state, territory, possession or country, are equivalent to the requirements for initial registration in this state.

"2. The board is hereby authorized to negotiate and effect arrangements with the appropriate officers of other states, territories, possessions and countries, to facilitate such exchange or reciprocal registration."

While there appears to be some conflict between the two sections, inasmuch as Section 327.030 requires those engineers registered thereunder to be an American citizen while Section 327.100 does not, the legislative history of the two sections indicates that reciprocal registration under Section 327.100 is not subservient to the provisions of Section 327.030, and citizenship is not a requirement for reciprocal registration thereunder.

Section 327.030, as originally enacted, did not require applicants for registration thereunder to be a citizen of the United States, or its territories. Laws 1941, p. 655, Sec. 11. Neither did this section provide for registration by reciprocity or comity with other states. In this original law, the only provisions for such registration were contained in Section 18, now Section 327.100. As now, the original Section 18 contained no requirements of citizenship.



Mrs. Olean Barton

Section 327.030 (formerly Sec. 11) was amended in 1951 by, among other things, adding the citizenship requirement and providing for reciprocal and comity registration in the same language as now contained in paragraph (3) quoted above. Section 327.100 was amended to its present form in 1947 and was unaffected by the amendment to Section 327.030 in 1951.

Thus, since the reciprocal registration authority given by Section 327.100 was in existence prior to the similar authority added to Section 327.030, the requirements of the former section cannot be said to be governed by the requirements of the latter. Since there are no requirements that one seeking reciprocal registration under Section 327.100 be an American citizen, no such requirement is superimposed by the provisions of Section 327.030.

#### CONCLUSION

Exchange or reciprocal registration may be granted to an applicant under Section 327.100, RSMo, if he meets the requirements set forth therein even if the applicant is not a citizen of the United States.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John H. Denman.

Very truly yours,

  
NORMAN H. ANDERSON  
Attorney General

STATE PLANNING:  
FEDERAL-STATE AGREEMENTS:

Authority of State Planning Office to contract and use federal planning funds under the Housing Act of 1954, as amended.

August 30, 1966

OPINION NO. 446  
Answered by Letter  
(DeFeo)

Honorable Philip V. Maher, Director  
Office of State and Regional Planning  
and Community Development  
Jefferson Building  
Jefferson City, Missouri

Attention: Peter W. Salsich, Jr.

Re: Statewide Plan  
Project Mo. P-31

Dear Mr. Salsich:

Pursuant to the request of your office, of August 24, 1966, we have reviewed the provisions of the Housing Act of 1954, Public Law 83-56, as amended, 40 U.S.C. 460-462, and Senate Bill 14, Second Extra Session, 73rd General Assembly (Chapter 251 RSMo), which establishes the State Planning Office.

Pursuant to Section 33, Senate Bill 14, supra, (Section 251.110 RSMo), the planning functions and obligations previously performed by the Division of Commerce and Industrial Development were transferred to the State Planning Office.

Based upon the foregoing, it is the opinion of this office that the Office of State and Regional Planning and Community Development of the State of Missouri has the power and authority:

1. To perform or assist planning by the State, counties, municipalities, metropolitan planning areas, and regional planning commissions;
2. To contract with the United States and to receive and expend Federal, State appropriated and other funds, public and private for the purpose of carrying out the above planning functions.

Yours very truly,  
NORMAN H. ANDERSON  
Attorney General

LCD:db

Louis C. DeFeo  
Assistant Attorney General



PROXY VOTING:  
PUBLIC CORPORATIONS:  
POULTRY BOARD:  
BOARDS:  
PUBLIC BOARDS; ETC.:

A member of the poultry board may not delegate or authorize another person to vote by proxy in his place but has a public duty to be present and vote in person in the interests of the public.

October 18, 1966

OPINION NO. 451

Mr. Charles W. McElyea, Secretary ✓  
Missouri State Poultry Experiment Station  
P. O. Box 109  
Mountain Grove, Missouri 65711



Dear Mr. McElyea:

This opinion is written in response to your question whether members of the Board may vote by proxy vote at any meetings regularly called of the State Poultry Board.

Section 262.130, RSMo 1959, provides, in part, that the Governor shall appoint six members of the Poultry Board who are to be "selected with reference to their knowledge and practical experience in poultry culture; and, as far as possible, members representing the different poultry interests of the state."

It is evident from the statute (supra) that the legislature intended for the governor to appoint as board members specially qualified persons who have extensive knowledge and broad experience in the field of poultry culture to represent the different poultry interests as well as the public interest. Thus, the individuals appointed have imposed on them a special trust to be exercised in the public interest in a specialized field.

It is a recognized principle of municipal law that the legislative or discretionary functions of a governmental body may not be delegated. *City of St. Louis v. Franklin Bank*, 173 S.W.2d 837, 847; *Arkansas-Missouri Power Corporation v. City of Kennett*, 157 S.W.2d 782, 784. In 37 Am. Jur. "Municipal Corporations" Section 53, it states in part that:

"A municipal council cannot delegate to one of its own committees or to any other municipal officer the power to decide upon legislative matters properly resting in the judgment and discretion of the council, or, as held by some authorities, to one member of such governing body. \* \* \*"

Mr. Charles W. McElyea

The Missouri Supreme Court in *Lamar Township v. City of Lamar*, 261 Mo. 121, 189, said:

"Officers are creatures of the law, whose duties are usually fully provided for by statute. In a way they are agents but they are never general agents, in the sense that they are hampered by neither custom nor law and in the sense that they are absolutely free to follow their own volition. \* \* \*"

In *State v. Kessler*, 136 Mo. App. 236, 240, the court said:

"\* \* \* The Board of directors of the school district is a body clothed with authority to discharge such functions of a public nature as are expressly prescribed by statute. It can exercise no power not expressly conferred or fairly arising by necessary implication from those conferred. \* \* \*"

See also *Corley v. Montgomery*, 46 S.W.2d 283, 286; *Cape Girardeau School District No. 63 v. Frye*, 225 S.W.2d 484, 488.

We recognize in 62 C.J.S., Section 400, p. 759 that it is stated:

"A municipal governing body must act under some rules of procedure. Rules prescribed by statute or charter must be followed, but, in the absence thereof, the body may adopt its own rules and regulations, and, in the absence of these, the general rules of parliamentary law prevail."

However, the above statement is limited in application to matters of procedure, not of substance and discretion as we believe the right to vote must be considered to be.

Examination of the statutes do not reveal any authority creating the right of one member to grant by proxy to another his authority to participate in Board proceedings. Indeed as a public representative appointed because of their special knowledge and experience in this area that they have a public obligation to be present and personally exercise their right to vote in the public interest.

We believe, as a matter of public policy, that since the members of the Board are chosen by the governor to represent the state and require special experts in poultry culture and that they represent the public interest in this special field, that the

Mr. Charles W. McElyea

Board is charged with a public interest for the faithful performance of their duties. Conversely, the public is entitled to their judgment and discretion of each individual member of the Board upon whom authority to act has been confirmed by their appointment.

Inasmuch as there is no statute authorizing the Poultry Board to grant a proxy, we conclude that a proxy vote may not be given by a member of the poultry board to another person.

#### CONCLUSION

It is the opinion of this office that a member of the Poultry Board may not grant the right to participate in the proceedings of the Poultry Board by proxy, but such a board member has a public duty to be present and vote in person in the public interest.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Richard C. Ashby.

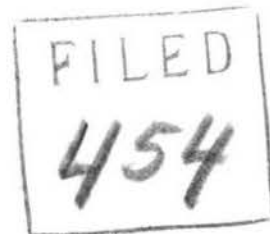
Very truly yours,

  
NORMAN H. ANDERSON  
Attorney General

October 21, 1966

OPINION NO. 454  
Answered by Letter-Nowotny

Honorable Carl O. Brandwein  
State Representative - 10th District  
Jackson County  
11413 Oakland  
Kansas City, Missouri 64134



Dear Representative Brandwein:

This is in answer to your request for an opinion, which request reads as follows:

"I have been asked to request an opinion in regard to the Liquor Control Act. Sect. 311.110. The question is, 'How many names are needed on the petition as mentioned in the first sentence?'

"Request pertains to the City of Lee's Summit, Missouri. 1960 census - 8,627. Total votes cast in City election of April, 1966, 3,623. Registration is not required to vote in city election.

"According to the last sentence of Sect. 311.110, and the footnote pertaining to 'Qualified voter, those



Honorable Carl O. Brandwein

people passing the petition feel that the number of names needed is 725, which is one-fifth of the total votes cast in the April, 1966 City election."

Section 311.110, RSMo, reads in part as follows:

"Upon application by petition signed by one-fifth of the qualified voters of any incorporated city, who are qualified to vote for members of the legislature in such incorporated city of this state, the board of aldermen, city council or other proper officials of such incorporated city shall order an election to be held in such incorporated city, \* \* \* provided further, that the board of aldermen, city council or other proper officials shall determine the sufficiency of the petition presented by the poll books of the last previous city election."

Enclosed is a copy of Attorney General Opinion, dated June 25, 1951, issued to the Honorable Raymond H. Vogel. This opinion dealt with Section 311.110, supra, and concluded that the city council in discharging its duty under this statute "is not bound to follow any particular method in reaching such a determination." Under this opinion, in a town where the voters must be registered then the proper city officials could determine that the petition has one-fifth of the registered voters, but they are not bound to follow that method.

You state that in Lee's Summit registration is not a requirement for voting in city elections. Therefore, it is our opinion that the proper city officials of Lee's Summit may determine the sufficiency of the petition by poll books of the last city election. Again, however, they are not bound to follow that method.

Yours very truly,

NORMAN H. ANDERSON  
Attorney General

WWN:cw

Enclosure (opinion):

6/25/51, to Vogel

SCHOOLS: Nomination of a school director by petition in  
SCHOOL BOARDS: certain urban school districts as provided in  
ELECTIONS: Section 162.491, RSMo Supp. 1965, may be filed  
NOMINATIONS: at any date within a reasonable time prior to  
TIME: the election.

OPINION NO. 455

October 18, 1966

Honorable Harold L. Holliday  
State Representative  
2907 Cleveland  
Kansas City, Missouri



Dear Representative Holliday:

This official opinion is rendered in response to your request for a ruling referring to Section 162.491, RSMo Supp. 1965. You inquire as to the time prior to election within which nomination of a school director by petition must be filed.

Section 162.491, provides for the nomination of school directors in Kansas City and certain other urban districts, in the first two subsections dealing with nomination by political party committees of the county. Subparagraph 3, provides for nomination by petition as follows:

"Directors for urban school districts may also be nominated by petition to be filed with the secretary of the board and signed by a number of voters in the district equal to ten per cent of the total number of votes cast for the director receiving the highest number of votes cast at the next preceding biennial election."

You call our attention to Sections 120.140 through 120.230, RSMo 1959. These statutes do not apply to school director elections in the Kansas City or other urban school districts. See: Section 120.150.

Section 162.491(2), provides that nominations by political committees must be filed not later than thirty days before the election. However, the statute does not prescribe a time within which nominations by petition must be filed.

Honorable Harold L. Holliday

It is a general proposition of law that where no time is expressed, a reasonable time is implied. This rule applies to the time for filing nominations 29 C.J.S., Elections, Section 137, p. 399; Austin v. City of Alice, Tex., 193 S.W.2d 290.

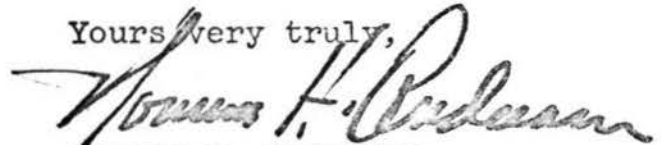
What constitutes a reasonable time will depend upon the facts of the particular situation. In determining reasonable time, consideration should be given to the time necessary to prepare official ballots and election notice requirements.

#### CONCLUSION

Therefore, it is the opinion of this office that nomination of a school director by petition in certain urban school districts as provided in Section 162.491, RSMo Supp. 1965, may be filed at any date within a reasonable time prior to the election.

The foregoing opinion, which I hereby approve, was prepared by my assistant Louis C. DeFeo, Jr.

Yours very truly,

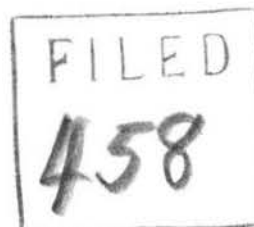
A handwritten signature in dark ink, appearing to read "Norman H. Anderson", written in a cursive style.

NORMAN H. ANDERSON  
Attorney General

October 17, 1966

OPINION NO. 458  
Answered by Letter-Price

Honorable Maurice B. Graham  
Prosecuting Attorney  
Madison County  
148 East Main Street  
Fredericktown, Missouri



Dear Mr. Graham:

This is in reply to your letter dated September 20, 1966, concerning your request for opinion, dated September 3, 1966. You now desire an opinion regarding liability of a county hospital and any additional information we have concerning the matter.

I have assumed that you refer to county hospitals organized under Section 205.160 et seq RSMo.

Opinion No. 15 issued April 10, 1950, to John M. Cave, answers your question regarding liability of county hospitals. Opinion No. 2 issued May 7, 1953, to James R. Amos, also may touch on your question. Therefore, I am enclosing the aforementioned opinions.

You also requested any additional information in this matter. I assume you were referring to disposition of the abortus, early and late, etc.

If birth occurs after twenty weeks of gestation, the Division of Health of Missouri requires the completion of Form V. S. 357 Rev. 9-55. (Standard Certificate of Fetal Death). I am enclosing

Honorable Maurice B. Graham

said form and also call your attention to Chapter 193, RSMo, which covers the subject.

Yours very truly,

NORMAN H. ANDERSON  
Attorney General

jmp;cw

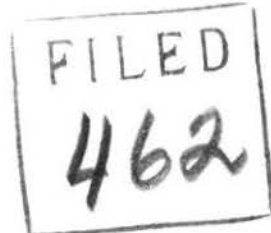
Enclosures (opinions):

No. 15, to Cave, 4/10/50;  
No. 2, to Amos, 5/7/53;

Form V. S. 375 REV. 9-55 (Standard Certificate of  
Fetal Death)

OPINION NO. 462  
Answered by Letter--  
Peterson

September 8, 1966



Dr. L. M. Garner, M.D.  
Acting Director  
Division of Health  
State Office Building  
Jefferson City, Missouri

Re: Trustees--County Health Center

Dear Dr. Garner:

This will acknowledge your letter dated September 2, 1966, in which you asked whether or not a person who files for the position of trustee for a county health center must be a resident of the county in which the filing is made.

It is assumed that your reference to county health center is that provided for in Chapter 205, RSMo Cum. Supp. 1965. We direct your attention to Section 205.031, paragraph 1, supra, which states as follows:

"1. The county court shall appoint five trustees chosen from the citizens at large with reference to their fitness for such office, all residents of the county, not more than three of the trustees to be residents of the city, town or village in which the county health center is to be located, who shall constitute a board of trustees for said county health center." (Emphasis Added.)

The provision in the above quoted section that the trustees be residents of the county applies equally to persons running for such office in addition to those appointed pursuant to Section 205.031, paragraph 1, supra.

Since your letter of the above date did not indicate that the health center involved was composed of more than one county, this office does not pass on that question.

Very truly yours,

NORMAN H. ANDERSON  
Attorney General

by

William A. Peterson  
Assistant Attorney General

WAP/jlf  
cc:Ms. Bess Smoot



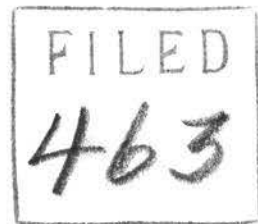
TAXATION:  
TAXES:  
COUNTY COLLECTOR:

- 1) Surplus money received from the sale of real estate for taxes must, when demanded by the person entitled thereto, be paid immediately to such person. 2) The owner of real estate sold for taxes is not required to execute a deed to purchaser or any other person at any time.

December 13, 1966

OPINION NO. 463

Honorable James Millan  
Prosecuting Attorney  
Pike County  
Bowling Green, Missouri



Dear Mr. Millan:

In your letter of September 8, 1966, you requested an opinion from this office which reads as follows:

"The Pike County Collector and Pike County Treasurer have requested me to ask for an opinion from your office relative to a certain tax sale that took place here in Pike County.

"In this instance there is a tract of ground near Bowling Green upon which is situated a residence. The taxes were three years delinquent on this property and because it appeared that the property had been abandoned the Collector advertised this property for sale at a tax sale and it was sold at public auction in accordance with the Statutes for a sum considerably larger than the amount of taxes against the property.

"The owner of the property has now come in and has demanded from the Treasurer and Collector the surplus funds and has refused to execute a Deed to the purchaser at the tax sale. The said owner is taking the position that she has two years to redeem the property, if she wishes, under Section 140.340 of the Revised Statutes of Missouri, and that within the two years she has the option whether to simply accept the surplus and permit the Col-

Honorable James Millan

lector to give a Collector's Deed to the purchaser at the sale, or she can redeem under the Statutes and pay to the purchaser the total purchase price plus 10 per cent, plus any improvements that he may have made on the property.

"Our question is, is it permissible for the Treasurer to pay over the said surplus to the record owner pending the two year period? If so, is the record owner obligated to give a Deed to the purchaser at the tax sale?

"I can find no authority for this, although Section 140.230 does provide for what happens in case the owner or owners cannot be found. This would seem to imply that if the owner can be found, as is our case, then the surplus or overplus is to be paid directly to the owner pending the exercise of the owner's option whether to redeem or not during the two year period.

"May we have an opinion on this or a copy of any previous opinion that may have been issued."

Section 140.280, RSMo 1959, provides in part:

"1. Where such sale is made, the purchaser at such sale shall immediately pay the amount of his bid to the collector, who shall pay the surplus, if any, to the person entitled thereto; or if he has doubt, or a dispute arises as to the proper person, the same shall be paid into the county treasury to be held for the use and benefit of the person entitled thereto."

Under this section it is the duty of the county collector to pay any surplus he receives from the sale of real estate for taxes over and above the amount of taxes and costs of sale to the person entitled to said surplus, and, if there is any doubt as to the person entitled thereto, the same shall be paid into the county treasury to be held for the person entitled thereto.

Under Section 140.230, RSMo 1959, when any property is sold for taxes and there is a surplus received from the sale and the owner or owners or person representing the owners cannot

Honorable James Millan

be found, it is the duty of the collector to make a sworn written statement to the county court of this fact, and upon approval of the statement by the county court, the surplus is to be paid to the county treasurer to be held in trust for the owner of said property. It further provides that the county court shall compel the owners to make satisfactory proof that they are entitled to the money before the same shall be paid to them. This section applies only when the person entitled to the surplus is unknown or cannot be found.

Under Section 140.290, RSMo 1959, the county collector shall at the time of sale give to the purchaser a certificate of purchase describing the land, the amount of tax, penalty, interest and cost of sale and the excess in amount of the taxes and costs together with the names of the owners as provided therein.

Section 140.340, RSMo 1959, provides as follows:

"The owner or occupant of any land or lot sold for taxes, or any other persons having an interest therein, may redeem the same at any time during the two years next ensuing, in the following manner: By paying to the county collector, for the use of the purchaser, his heirs or assigns, the full sum of the purchase money named in his certificate of purchase and all the cost of the sale together with interest at the rate specified in such certificate, not to exceed ten per cent annually, with all subsequent taxes which have been paid thereon by the purchaser, his heirs or assigns, with interest at the rate of eight per cent per annum on such taxes subsequently paid, and in addition thereto the person redeeming any land shall pay the costs incident to entry of recital of such redemption.

"2. Upon deposit with the county collector of the amount necessary to redeem as herein provided, it shall be the duty of the county collector to mail to the purchaser, his heirs or assigns, at the last post office address if known, and if not known, then to the address of the purchaser as shown in the record of the certificate of purchase, notice of such deposit for redemption.

Honorable James Millan

"3. Such notice, given as herein provided, shall stop payment to the purchaser, his heirs or assigns, of any further interest or penalty.

"4. In case the party purchasing said land, his heirs or assigns, fails to take a tax deed for the land so purchased within six months after the expiration of the two years next following the date of sale, no interest shall be charged or collected from the redemptioner after that time."

Under Section 140.420, supra, it is the duty of the purchaser or his assignee to secure a deed from the county collector at the expiration of two years from the date of sale, and under Section 140.410, RSMo 1959, it is the duty of the purchaser to have this deed recorded in the recorder's office within four years of the date of sale. If it is not recorded, the purchaser loses his right to a deed, reimbursement from the collector of the money paid and all interest in said real estate. *Journey v. Miler*, 250 S.W. 2d 164.

There is no law or statutory provision requiring the owner of real estate that is sold for taxes to execute any kind of a deed to the purchaser or to any other person at any time.


#### CONCLUSION

It is the opinion of this office: 1. That it is the duty of the county collector to pay immediately on demand to the person entitled thereto any surplus money received from the purchaser of real estate at a tax sale over and above the amount of taxes and costs of sale. If the money has been deposited with the county treasurer, it shall be the duty of the county treasurer to pay the surplus money to the persons entitled thereto when they have made said proof of their claims to the county court.

2. There is no law or statute requiring the owner of real estate sold for taxes to execute any kind of a conveyance to the purchaser of real estate sold for taxes at any time.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Moody Mansur.

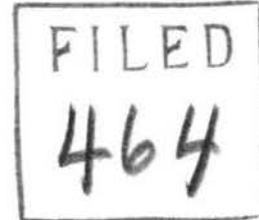
Very truly yours,

  
NORMAN H. ANDERSON  
Attorney General

Opinion No. 464  
Answered by Letter - Storts

September 8, 1966

Honorable David W. Fitzgibbon  
Judge, St. Louis Court of  
Criminal Corrections  
Municipal Courts Building  
St. Louis, Missouri



Dear Judge Fitzgibbon:

Enclosed are copies of Opinions numbered 390 to O'Brien and 69 and 169 to David which my Assistant Brick Storts discussed with you on the telephone.

It is our feeling that you have jurisdiction to hear the three items listed and to determine whether or not to reinstate a drivers license of a person who has refused to take a chemical breath test as provided in Section 564.444, RSMo Cum. Supp. 1965.

The language of paragraph two of the aforementioned section states that a person may request a hearing before a court of record in the county in which he resides or in the county in which the arrest occurred. Looking at that in conjunction with 479.010, RSMo 1959, where the St. Louis Court of Criminal Corrections is specifically called a court of record, it is our feeling you have jurisdiction in hearings of this type.

I hope this answers your question and if we can be of any further assistance, please don't hesitate to call.

Yours truly,

NORMAN H. ANDERSON  
Attorney General

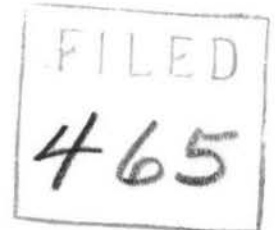
Enclosures (3)

CONFLICT OF INTEREST:  
SOIL AND WATER CONSERVATION  
DISTRICTS AND SUB-DISTRICTS:  
SOIL CONSERVATION DISTRICT  
COMMISSION:  
SOIL CONSERVATION SUBDISTRICT:

The appointment of a member of the state soil and water districts commission, or a member of the board of supervisors of a soil and water conservation subdistrict, or a member of the trustees to the governing body of a subdistrict as the contracting officer for a soil and water conservation subdistrict is against public policy and void.

OPINION NO. 465

December 29, 1966



Mr. Lee E. Norbury  
Assistant Executive Secretary  
Missouri State Soil and Water Districts  
Commission  
T-7 Building  
University of Missouri  
Columbia, Missouri

Dear Mr. Norbury:

This is in answer to your request for an opinion concerning a possible conflict of interest in the hiring of a contracting officer by the board of supervisors of a soil and water conservation subdistrict.

You have stated that the contracting officer is appointed by and is an agent of the subdistrict; is primarily responsible for the development, execution and administration of contracts of the subdistrict; and that his duties and compensation are determined by the subdistrict. However, the contracting officer is not a party to any contract and does not himself award contracts. The soil and water conservation subdistrict through the board of supervisors awards any contracts made.

You have asked whether the appointment of a member of the state commission, a member of the board of supervisors or a trustee of the subdistrict as contracting officer creates a conflict of interest.

If there is any conflict of interest in these appointments, it is because they are against public policy as declared by the common law.



Mr. Lee E. Norbury

The Supreme Court of Missouri in Nodaway County v. Kidder, 129 S.W.2d 857, 861, has declared that a contract between an individual and a public body of which he is a member is void as against public policy:

"[11, 12] Appellant's alleged contract was also void as against public policy regardless of the statute. A member of an official board cannot contract with the body of which he is a member. The election by a Board of Commissioners of one of its own members to the office of clerk and agreement to pay him a salary was held void as against public policy. \* \* \*"

The Supreme Court in a more comprehensive discussion of the common law on this subject in Githens v. Butler County, 165 S.W.2d 650, 652, said:

"[1-3] ' \* \* \* The directors of a private corporation may, if there is no fraud in fact or unfairness in the transaction, contract on behalf of the corporation with one of their number. A stricter rule is laid down in regard to public corporations, and it is held that a member of an official board or legislative body is precluded from entering into a contract with that body.' 6 Williston, Contracts, §1735, p. 4895. The basis of this common law rule is that it is against public policy (State ex rel. Smith v. Bowman, 184 Mo. App. 549, 170 S.W. 700) for a public official to contract with himself. 'At common law and generally under statutory enactment, it is now established beyond question that a contract made by an officer of a municipality with himself, or in which he is interested, is contrary to public policy and tainted with illegality; and this rule applies whether such officer acts alone on behalf of the municipality, or as a member of a board of [or] council. \* \* \* The fact that the interest of the offending officer in the invalid contract is indirect and is very small is immaterial. \* \* \* It is impossible to lay down any general rule defining the nature of the interest of a municipal officer which comes without the operation of these principles. Any direct or indirect interest in the subject matter is sufficient to taint the contract with illegality, if the interest be such as to affect the judgment and conduct of the officer either in the making of the contract

Mr. Lee E. Norbury

or in its performance. In general the disqualifying interest must be of a pecuniary or proprietary nature.' 2 Dillon, Municipal Corporations, §773; 46 C.J. § 308; 22 R.C.L., §121; State ex rel. Streif v. White, Mo. App., 282 S.W. 147; Witmer v. Nichols, 320 Mo. 665, 8 S.W.2d 63, Nodaway County v. Kidder, 344 Mo. 795, 129 S.W.2d 857."

In State ex rel. Smith v. Bowman, 184 Mo. App. 549, 170 S.W. 700, the Springfield Court of Appeals said, l.c. S.W. 703:

"A great statesman has voiced the basic principles governing official conduct by declaring that 'a public office is a public trust.' Like a trustee, such officer must not use the funds or powers intrusted to his care for his own private gain or advancement. To allow him to do otherwise is against public policy. It is of the utmost importance that every one accepting a public office should devote his time and ability to the discharge of the duties pertaining thereto without expectation of personal reward or profit other than the salary fixed at the time of accepting the same; and that he should do so, except for a most weighty reason, to the end of his term. Certainly the trend and policy of our law in this respect is to remove from public officials, so far as possible, all temptation to use that official power, directly or indirectly, to increase the emoluments of such office; and so they are forbidden to become interested in contracts let by them, or to have their salaries increased or decreased, or to accept offices created by themselves."

We also cite you to Polk Township, Sullivan County v. Spencer, 259 S.W.2d 804, 805, and 67 C.J.S., Officers, Section 116, Page 406 and 407.

A soil and water conservation subdistrict is governed by a board of soil district supervisors. Section 278.240, RSMo Cum. Supp. 1965. This section reads as follows:

"1. The board of soil and water conservation district supervisors of a soil and water conservation district in which the subdistrict is formed shall be the governing

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body of the subdistrict. When a subdistrict lies in more than one soil and water conservation district, the combined boards of soil and water conservation district supervisors shall be the governing body.

"2. Three persons living within the subdistrict shall be elected to serve as trustees to the governing body of the subdistrict. The trustees shall be elected by a majority vote of all land representatives participating in the referendum for the establishment of the subdistrict, but the date of the election shall not fall upon the date of any regular political election held in the county. At the first regular election of trustees after October 13, 1963, one trustee shall be elected for a period of two years, one trustee shall be elected for a period of four years, and one trustee shall be elected for a period of six years. Each of their successors shall be elected for a period of six years. The trustees, acting in an advisory capacity, shall assist in the administration of the subdistrict. The trustees shall be reimbursed for any expenses incurred in the attendance of meetings of the governing body of the subdistrict."

The board of supervisors directly governs the subdistrict and as one of their functions directly employs and compensates the contracting officer. It is our opinion that the appointment of one of the members of the board of supervisors as contracting officer would clearly violate public policy and be void.

The trustees of the subdistrict, although not the governing body of the subdistrict, do advise the board of supervisors and assist the administration of the subdistrict. It is our opinion that the trustees have such an interest, though indirect, in the appointment of a contracting officer that the appointment of a trustee would also be against public policy and void.

Your last situation concerns the members of the state commission. Section 278.080, RSMo 1959, reads in part as follows:

"1. There is hereby established 'The State and Soil Districts Commission' to administer for this state the soil conservation districts herein provided for by this law. The soil commission shall formulate policies and general programs for the

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saving of Missouri soil by the soil conservation districts; it shall receive and allocate or otherwise expend for the use or benefit of the soil conservation districts any funds appropriated by the legislature of this state for the use or benefit of such districts; it shall receive and properly convey to the soil conservation districts any other form of aid extended to such districts by any other agency of this state, except that any money or other form of aid raised or provided within a soil district for the use or benefit of that soil district shall be received and administered by the governing body of that soil district; it shall exercise other authority conferred upon it and perform other duties assigned to it by this law; and it shall be the administrative agency to represent this state in these and all other matters arising from the provisions of this law.

\* \* \* \* \*

"5. In addition to the authority and duty herein assigned to the state soil districts commission, it shall have the following authority and duty:

\* \* \* \* \*

(2) To formulate and fix the rules and procedures for fair and impartial referendums on the establishing or disestablishment of soil district; for fair and impartial selection of soil districts supervisors;

\* \* \* \* \*

(4) To advise any soil conservation district in developing its program for saving the soil, in order that such district may become eligible for any form of aid from state or federal sources;

(5) To obtain or accept the cooperation and financial, technical or material assistance of the United States or any of its agencies, and of this state or any of its agencies, for the work of such soil districts;

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(6) To enter into agreements with the United States or any of its agencies on policies and general programs for the saving of Missouri soil by the extension of federal aid to any soil conservation district; to advise any soil conservation district on the amount or kind of federal aid needed for the effective saving of soil in that district; to determine within the limits of available funds or other resources the amount or kind of state aid to be used for saving the soil in any soil conservation district; and to determine the withholding of state aid of any amount or kind from any soil conservation district which has failed to follow the policies of the state soil districts commission in any matter under the provisions of this law;

(7) To give such other proper assistance as the soil commission may judge to be useful to any soil district in the saving of soil in that district."

Section 278.120, RSMo 1959, establishes the authority and duties of a soil and water district through the board of supervisors and enumerates, in addition to others, the following duty:

"2. (5) To make and execute contracts and other legal instruments, necessary for the saving of the soil in that district, subject to approval by the state soil districts commission;"

Finally, Section 278.210, RSMo 1959, reads as follows:

"The state soil districts commission shall develop the procedure including rules, regulations, forms and other documents to be used in the establishment of a subdistrict, and a board of supervisors shall submit to the state soil districts commission for its approval copies of any rules, regulations, forms and other documents as this board shall contemplate using in pursuance of their duties, and such other information concerning their activities as the soil commission may require in the performance of its own duties under sections 278.160 to 278.270."

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Because of the general supervisory authority and control over the operation of the districts and subdistricts, it is our opinion that the state commission also has such an interest, though indirect, in the appointment of a contracting officer that the appointment of a commission member would be against public policy and void.

CONCLUSION

It is the opinion of this office that the appointment of a member of the state soil and water districts commission, or a member of the board of supervisors of a soil and water conservation subdistrict, or a member of the trustees to the governing body of a subdistrict as the contracting officer for a soil and water conservation subdistrict is against public policy and void.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Walter W. Nowotny, Jr.

Yours very truly,

  
NORMAN H. ANDERSON  
Attorney General



COUNTY BUDGETS:  
SECTIONS 50.680 and 50.710  
REPEALED BY HOUSE BILL 205:

House Bill No. 205 enacted by the  
73rd General Assembly expressly  
repeals Sections 50.680 and 50.710,  
RSMo 1959, as amended and re-enacted  
by Senate Bill No. 3 of the 73rd  
General Assembly effective January 1,  
1967.

The state auditor is required to develop or approve adequate  
budget forms for third and fourth class counties as required by  
Sections 50.525 to 50.745.

November 1, 1966

OPINION NO. 470

Honorable Haskell Holman  
Auditor for State of Missouri  
Capitol Building  
Jefferson City, Missouri



Dear Mr. Holman:

In your letter of September 19, 1966, you requested an opinion  
from this office as follows:

"Sections 50.680 and 50.710, RSMo 1959 were  
repealed and re-enacted, as amended, by  
Senate Bill 3 of the Seventy Third General  
Assembly. This act was signed by the  
Governor March 31, 1965.

"Subsequent to the date Senate Bill 3 was  
introduced House Bill 205 was introduced  
and together with other designated sections,  
Sections 50.680 and 50.710 RSMo 1959 were  
again set forth and repealed by the passage  
of House Bill 205.

"The questions for clarification are as  
follows:

- A. Will third and fourth class  
counties on and after January 1,  
1967, be required to set forth  
by classes the proposed and esti-  
mated expenditures as required  
under the provisions of Sections  
50.680 and 50.710 of Senate Bill 3?
- B. Or does the subsequent enactment  
of House Bill 205 nullify the pro-  
visions of Senate Bill 3 on and  
after January 1, 1967?

Honorable Haskell Holman

C. In the event that Sections 50.680 and 50.710 of Senate Bill 3 is effective would the form of budget as used for 1966 be applicable for 1967?"

In your letter you state that Senate Bill No. 3 was passed by the 73rd General Assembly and approved by the Governor on March 31, 1965, that subsequent to this date House Bill No. 205 was passed by the 73rd General Assembly. Senate Bill No. 3 expressly repealed Sections 50.680 and 50.710, RSMo 1959, and re-enacted two new sections bearing the same section number. House Bill No. 205 expressly repealed Sections 50.680 and 50.710, RSMo 1959, together with several other sections expressly mentioned therein effective January 1, 1967. The answer to your question depends upon the effect of House Bill No. 205.

The basic rule in construction of statutes is to discover the lawmaker's intention and if possible to affectuate that intention and thereby attain the object and purpose of the statute. *Hearn v. Carpenter*, Mo., 312 S.W.2d 823.

In 82 C.J.S. Statutes, paragraph 302, it is stated:

"Ordinarily a repeal of a statute which has been amended operates on, and carries with it, the amendment, at least where the amendment merely enlarged and extended the provisions, and did not affect the identity, of the original statute; but it is otherwise where the repealing statute expressly saves amendments, or where a so-called amendatory act is in reality affirmative and original in its character. Where a section of a statute is amended and the amendment is made in such terms that it stands in the place of the section, a subsequent act expressly repealing the original statute also repeals the amendment. Also, where a section of a statute is amended, and afterward such section, 'as amended,' is repealed, the original section, and not the amendment merely, is repealed. \* \* \*"

In *State ex rel. Atlantic Horse Insurance Co. v. Blake*, 241 Mo. 100, the Court was considering an act of the legislature passed in 1909. The legislature in 1901 passed an act expressly repealing Section 7957, RSMo 1899, and enacting a new section in lieu thereof to be known as Section 7957. In 1909 the legislature passed an act amending Section 7957, RSMo 1899, but did not refer

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to the act of 1901. The contention was made since the act passed in 1909 did not refer to the act of 1901 that the act of 1901 was still in effect. In discussing this matter the Courts stated, l.c. 105:

"In our opinion the contention of relator in this regard is unsound. The Act of 1901, by its terms, took the place of section 7957, Revised Statutes 1899, and became, after it took effect, to all intents and purposes, section 7957, Revised Statutes 1899, and subsequent reference to said section applied to the said 1901 act. Consequently, when the Act of 1909 amended said section, such amendment referred to the Act of 1901, which had been substituted for said section 7957.

"The rule of law is that when a section of a statute is amended or displaced by a later substituted act, and still later an act is passed which in terms purports to amend the original section, referring to it by number, such last amendment applies to any intermediate amendment of, or substitution for, the original section, such intermediate amendment or substitute to be regarded as if it had always been a part of, or in place of, the original section. [State v. Schenk, 238 Mo. 429; Kamerick v. Castleman, 21 Mo. App. 587; Blake v. Brackett, 47 Me. 28; Greer v. State, 22 Tex. 588; Rowan v. Ide, 107 Fed. 161; Endlich on Int. of Stat., sec. 294; McKibben v. Lester, 9 Ohio St. 627.]

"In the last-named case the court said: 'When one or more sections of a statute are amended by a new act, and the amendatory act contains the entire section or sections amended, and repeals the section or sections so amended, the section or sections as amended must be construed as though introduced into the place of the repealed section or sections in the original act.'"

Senate Bill No. 3 expressly repealed Sections 50.680 and 50.710, RSMo 1959, and re-enacted two new sections to be known as Sections 50.680 and 50.710. To all intentions and purposes these

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sections were substitutes for the same sections that had been repealed. House Bill No. 205 also expressly repealed Sections 50.680 and 50.710, RSMo 1959 effective January 1, 1967. Certainly the legislature did not intend by House Bill No. 205 to repeal statutes which had already been repealed by Senate Bill No. 3. Undoubtedly the legislature when it enacted House Bill 205 intended to and did expressly repeal these specific sections as well as their amendments or substitutes and we so rule.

Section 50.745, RSMo Cum. Supp. 1965, which becomes effective January 1, 1966, provides as follows:

"The state auditor shall develop or approve adequate forms which will be used by counties of the third or fourth class in compliance with sections 50.525 to 50.745. The state auditor is authorized to appoint committees of county judges and clerks to assist in developing such forms."


#### CONCLUSION

It is the opinion of this office that House Bill No. 205 enacted by the 73rd General Assembly expressly repeals Sections 50.680 and 50.710, RSMo 1959, as amended and re-enacted by Senate Bill No. 3 of the 73rd General Assembly effective January 1, 1967.

The state auditor is required by Section 50.745, RSMo Supp. 1965, to develop or approve adequate budget forms for third and fourth class counties in compliance with Sections 50.525 to 50.745.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Moody Mansur.

Very truly yours,

  
NORMAN H. ANDERSON  
Attorney General

ASSESSMENT:  
REASSESSMENT:  
REEVALUATION OF REAL PROPERTY:  
BALLOTS:

The ballot proposition to be submitted to the voters under Section 137.037, RSMo Cum. Supp. 1965 requires that the dollars to pay for the cost of reevaluation of real property subject to taxation in the county should be expressed in specific figures.

October 3, 1966

OPINION No. 473

Honorable Harold L. Fridkin  
County Counselor  
Jackson County Courthouse, Suite 202  
Kansas City, Missouri 64106



Dear Mr. Fridkin:

This is in response to your request for an opinion dated September 19, 1966, which reads as follows:

"The County Court of Jackson County, Missouri, hereby requests an opinion concerning Section 137.037, Laws of 1965 (Senate Bill No. 295).

On the ballot to be presented to the voters in the November election, pursuant to said statute, is it necessary to state the dollar amount that is to be provided by said levy, or may the ballot be phrased in more general terms, such as '\* \* \*to provide funds to pay the cost of a reevaluation \* \* \*'."

Section 137.037, RSMo Cum. Supp. 1965, authorizes the County Court at any general election to submit to the voters a proposition to authorize a levy of not to exceed two mills on the dollar on the assessed valuation of all tangible property for the purpose of reevaluating all real property subject to taxation in the county. Paragraph 3, subparagraph (1) provides as follows:

Honorable Harold L. Fridkin

"3.(1) The county court of such county shall prepare and cause to be printed ballots to be used at such election which shall be in substantially the following form:

**OFFICIAL BALLOT**

**Instructions to voters:**

To cast a ballot in favor of the proposition submitted upon this ballot place a cross (X) mark in the square opposite the word 'Yes'; to vote against the proposition submitted upon this ballot place a cross (X) mark in the square opposite the word 'No!.

Shall the following be adopted:

Proposition to authorize the county court to levy a tax not to exceed twenty cents on the hundred dollars of assessed valuation on all property taxable by the county, for one year to provide \_\_\_\_\_ dollars to pay the cost of a reevaluation of all real property subject to taxation by the county.

Yes ☐

No ☐

It will be observed that the form of the ballot provides for the amount in dollars the county is submitting to the voters to pay the cost of such reevaluation of the real property. This indicates a clear legislative intent that the voters should be advised on the official ballot the amount of money which the county deems necessary to pay the cost of such reevaluation of the real property. We believe that the validity of an election which did not provide for such number of dollars in the ballot proposition to be submitted to the voters would be placed in grave jeopardy. The Legislative intent is manifest from the language used in the statute.

**CONCLUSION**

It is the opinion of this office that the ballot proposition to be submitted to the voters under Section 137.037, RSMo Cum. Supp.



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1965, requires that dollars to pay for the cost of a reevaluation of real property subject to taxation in the county should be expressed in specific figures.

The foregoing opinion which I hereby approve was prepared by my Assistant, J. Gordon Siddens.

Yours very truly,

A handwritten signature in cursive script, appearing to read "Norman H. Anderson".

NORMAN H. ANDERSON  
Attorney General

COUNTY HOSPITAL FUNDS:  
COUNTY HOSPITAL BOARD:  
COUNTY TREASURER:

A county hospital board may not invest  
public funds in bonds or other securities  
unless expressly authorized by statute.

OPINION NO. 478

December 22, 1966

This opinion should be accompanied  
by Op. No. 223 - 1975.

Honorable Thomas P. Baker  
Prosecuting Attorney  
Putnam County  
Unionville, Missouri



Dear Mr. Baker:

This opinion is rendered in response to your inquiry concerning the accumulated funds of a county hospital wherein you ask:

"1. May the Board of Trustees of a county hospital invest any or all of a maintenance fund of the hospital collected pursuant to Section 205.200 RSMo., Supp?

"2. If so, what type of investment is proper?

"3. If so, must the county court approve the investment?"

The statute which we must apply is Section 205.190 RSMo. Supp. which reads in pertinent parts as follows:

"The trustees shall, \* \* \* qualify \* \* \* and organize as a board of hospital trustees \* \* \*.

"2. The county treasurer of the county in which such hospital is located shall be treasurer of the board of trustees, \* \* \*  
The treasurer shall receive and pay out all the moneys under the control of the said board, as ordered by it, \* \* \*".

Honorable Thomas P. Baker

\* \* \* \* \*

"4. The board of hospital trustees shall make and adopt such bylaws, rules and regulations for their own guidance and for the government of the hospital as may be deemed expedient for the economic and equitable conduct thereof, not inconsistent with sections 205.160 to 205.340 and the ordinances of the city or town wherein such public hospital is located.\* \* \* They shall have the exclusive control of the expenditures of all moneys collected to the credit of the hospital fund, \* \* \* the purchase or construction of any hospital buildings, \* \* \* set apart for that purpose; provided, that all moneys received for such hospital shall be deposited in the treasury of the county to the credit of the hospital fund, and paid out only upon warrants ordered drawn by the county court of said county upon the properly authenticated vouchers of the hospital board.\* \* \*".

A study of the above quoted statutes establishes that the Board has "exclusive control of the expenditures of all moneys collected to the credit of the hospital fund", that such funds must be deposited with the county treasurer for safe-keeping and "paid out only upon warrants drawn by the County Court of said county upon the properly certified vouchers of the hospital board." Money can only be paid out upon vouchers of the hospital board for expenditures. Inasmuch as the county hospital and the county hospital board are creatures of statute, "they can exercise the following powers and no others: (1) those granted in express words; (2) those necessarily or fairly implied in or incident to the powers expressly granted; (3) those essential to the declared objects and purposes of the corporation - not simply convenient but indispensable." (Lancaster v. Atchison Co., 180 S.W.2d 706, 708). We find no statute authorizing the hospital board to invest surplus money in bonds, etc. We, therefore, answer your first question in the negative.

Your second and third questions are predicated upon the first question and by force of our answer to the first question, they become moot and will not be discussed further.

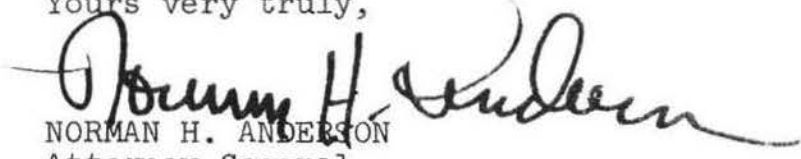
Honorable Thomas P. Baker

CONCLUSION

It is our opinion that a County Hospital Board may not invest public monies in bonds or other forms of investment unless expressly authorized by statutes under which they are organized or governed.

The foregoing opinion which I hereby approve was prepared by my assistant, Richard C. Ashby.

Yours very truly,

  
NORMAN H. ANDERSON  
Attorney General

ANSWERED BY LETTER  
Opinion No. 483 (Siddens)

September 21, 1966



Mr. John D. Paulus, Jr., Director  
Division of Planning and Construction  
Capitol Building  
Jefferson City, Missouri

Re: Bid Bond of J. R. Seal Construction  
Company - Insurance Company of  
North America - Surety

Dear Mr. Paulus:

At your request we have reviewed the bid bond of the Insurance Company of North America in connection with the bid of the J. R. Seal Construction Company relating to the proposal for the State Highway Patrol warehouse building in Jefferson City. You have inquired with respect to the validity of this bid bond in the situation where the penal sum of the bond has not been filled in but has been left blank.

We make the following observations:

1. The Condition of the bond provides as follows:

"THE CONDITION OF THE ABOVE OBLIGATION IS SUCH, that if the aforesaid principal shall be awarded the contract, the said principal will within the period specified therefor, or, if no period be specified, within ten (10) days after the notice of such award enter into a contract and give bond for the faithful performance of the contract, then this obligation shall be null and void, otherwise the principal and the surety will pay unto the obligee the difference in money between the amount of the bid of the said principal and the amount for which the obligee may legally contract with another party to perform the work if the latter amount be in excess of the former; in no event shall the liability hereunder exceed the penal sum hereof."

Mr. John D. Paulus, Jr.

You will observe that the principal and surety obligate themselves to the obligee to pay the difference in money between the amount of the bid of the principal and the amount for which the obligee may legally contract with another party to perform the work if the latter amount is in excess of the former. The failure therefore to include the penal sum is a mere irregularity and the penal sum may be inserted now or at any time.

2. It is clear that the obligee can now enforce this bid bond because of the above mentioned obligation.

3. The Invitation to Bid under Article VI of the instructions to bidders required the bid bond to be in the amount of five percent of the bid. It is therefore clear that an examination of the invitation to bidders together with the bid and the bond, the amount of the penal sum can be readily ascertained and should be read into the bond.

We conclude that the bid bond now having no penal sum filled in at the place provided is valid and can now be filled in and the bid may be accepted.

Yours very truly,

NORMAN H. ANDERSON  
Attorney General

By  
J. Gordon Siddens  
Assistant Attorney General

JGS/ms





December 1, 1966

Honorable E. H. Quigg  
Executive Secretary  
Missouri Boat Commission  
P. O. Box 603  
Jefferson City, Missouri



Dear Mr. Quigg:

This letter is in response to your request for advice. You state that a water patrolman in the course of his duties recovered property from floodwaters of the Little Platte River in the vicinity of Smithville, Missouri. You indicate the property may have a value in excess of ten dollars. You inquire as to the proper legal method of disposition of this property.

Chapter 420, RSMo 1959, contains the laws relevant to the disposition of property lost upon any river.

Section 420.090 sets forth the duties of the finder where the property exceeds the value of ten dollars. This section provides as follows:

"Whenever any such property shall be taken up and secured, if the same exceed the value of ten dollars, the taker-up shall forthwith go before some magistrate of the county and make oath that the property was wrecked or lost, without the consent of the owner as he believes, and was in a perishable condition, and that he was not directly or indirectly instrumental in causing the property to be wrecked, lost, set adrift, or placed in a perishable condition, and shall also state, upon oath, an exact account of the quantity and quality of such property, and the time that such property was taken up, and that he has not secreted or disposed of, directly or indirectly, any part thereof."

Honorable E. H. Quigg

Section 420.130 provides that where the property is valued at more than ten dollars but less than one hundred dollars the magistrate shall direct the sheriff to sell it.

Section 420.170 provides that if no complainant appears within six months, the money from the sale shall be paid into the county treasury.

If there should be doubt as to the value of the property, we call your attention to Section 420.260, which provides the method for ascertaining the value of the property found.

If it should be found that the property has a value less than ten dollars, then it may be disposed of under the provisions of Section 420.070, which are as follows:

"When any person shall take up and secure any such property of less value than ten dollars he may retain and dispose of the same to his own use, if the owner shall not claim the same within one year after the taking up."

The aforementioned statutes are the laws covering the disposition of lost property found upon a river of the state.

Yours very truly,

NORMAN H. ANDERSON  
Attorney General

December 8, 1966

OPINION NO. 499  
Answered by Letter-Denman

Honorable Don Burrell  
Prosecuting Attorney  
Greene County  
Springfield, Missouri



Dear Mr. Burrell:

This is in answer to your questions regarding certain procedural elements in prosecutions relating to obscene movies. As you know, this office rarely handles criminal prosecutions at the trial level, and we cannot give specific answers to all of your questions, but we are glad to give you what help we can.

The first question you ask is if there are any Missouri statutes in effect which apply to the showing of obscene movies. Section 563.280, RSMo Supp. 1965, which makes it a criminal offense to circulate obscene matter including any obscene, lewd, licentious, indecent or lascivious picture, photograph, print or other publication of indecent immoral, or scandalous character is, by its terms, applicable to the showing of obscene movies.

The standard of obscenity is that adopted by the United States Supreme Court. The basic standard as now applied was phrased by the Court in Roth v. United States and Alberts v. California, 354 U. S. 476, 77 S.Ct. 1304 (1957) as follows:

"\* \* \* whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."

Honorable Don Burrell

This standard was interpreted in three recent cases handed down by the Court, *Edward Mishken v. State of New York*, U.S. , 86 S.Ct. 958, 16 L.Ed.2d 56; *Ralph Ginzburg et al. v. U.S.*, U.S. , 86 S.Ct. 942, 16 L.Ed.2d 31; and *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of the Commonwealth of Massachusetts*, U.S. , 86 S.Ct. 975, 16 L.Ed.2d 1. In these cases, particularly in the Mishken and Ginzburg cases, the Court introduced the idea that at least in a criminal prosecution, as opposed to an in rem injunction suit, the manner in which the solicitation was made and the material sold, could be considered to determine whether the material was in fact obscene. Under this concept of variable obscenity, allowing children to see movies would be an element which might properly be considered to determine whether prosecution would lie.

As to your question of who you may proceed against, the statutes provide that any person who shall knowingly publish the obscene material is guilty of the offense. Keeping in mind the various elements that must be proved by the state, particularly knowledge, either actual or inferred, any person who contributes to the showing or publishing of the matter in such a manner as to constitute publication may be prosecuted. In *State v. Vollmar*, 389 S.W.2d 20, the latest Missouri case on obscene literature, the store manager who sold the books was prosecuted.

You also have asked whether you may proceed on the basis of an injunction prior to publication or file a regular criminal complaint after the film has been shown. Section 563.285, RSMo Supp. 1965, provides for the enjoining of the publication of obscene material pursuant to the procedure set forth therein. This remedy would be applicable to obscene movies.

However, I am sure you realize that because of the free speech doctrine, it generally is much more difficult to priorly restrain the publication of obscene material than to institute a criminal prosecution after publication.

We regret that we cannot supply you with sample complaints or forms for injunctions which you request as we have no such forms available to us.

We do refer you to the following cases involving alleged obscene movies which have been before the United States Supreme Court after its decision in the Roth-Alberts case which may be of help to you: *Kingsley Int'l Pictures Corp. v. Regents of*

Honorable Don Burrell

the University of New York, 360 U.S. 684, and Times Film Corporation v. City of Chicago, 355 U.S. 35. Also we recommend the article Censorship of Obscenity, The Development of Constitutional Standards, 45 Minnesota Law Review 5 (1960-61), a comprehensive discussion of the problem of obscenity.

Very truly yours,

NORMAN H. ANDERSON  
Attorney General

JHD:cw

ELECTION LAWS:  
ABSENTEE VOTING:

Chapter 112 on absentee balloting is mandatory in its application and limits absentee balloting to precise procedures spelled out in the statutes. An Elector wishing to vote must apply either in person or by mail for his ballot. An elector wishing to cast an absentee ballot must either return his ballot by mail or deliver it in person to the issuing officer.

OPINION NO. 500

November 3, 1966

Honorable Fred A. Murdock, Chairman  
Board of Election Commissioners  
1331 Locust Street  
Kansas City, Missouri 64106



Dear Mr. Murdock:

This opinion responds to your inquiries which you have posed by your letter involving the validity of your procedures for handling absentee ballots. The questions are set out below:

"1. May absentee ballots be issued to a qualified voter upon receipt of a signed written application therefor delivered by messenger to the Board, rather than by mail or a presentment by the applicant himself, in the light of the provisions of Section 112.020 RSMo., 1959?

"2. May the Board accept voted absentee ballots upon the delivery thereof to the Board by a messenger, rather than by mail or delivery by the voter in his own proper person, in light of the provisions of Section 112.050 RSMo., 1959?"

Parenthetically, it is noted the Missouri Constitution, 1945, provides in Article VIII, Section 7, only for absentee voting of those who are absent, whether within or without the state.



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The pertinent statutes on absentee voting, read, in part, as follows:

Section 112.010 RSMo., 1959 is as follows:

"Any person being a duly qualified elector of the state of Missouri, \* \* \* who expects to be absent from the county \* \* \* or any person who through illness or physical disability expects to be prevented from personally going to the polls to vote on election day, may vote at such election as herein provided."

Section 112.020 RSMo., 1959 is as follows:

"Any elector as defined in the foregoing section expecting to be absent from the county of his residence on the day of the election, or expecting to be prevented through illness or physical disability from personally going to the polls to vote on election day, \* \* \* may make application in person, or by mail, to the county clerk or, where existing, to the board of election commissioners, \* \* \* In the event the elector recovers from his illness or physical disability sufficiently to permit him to present himself at the proper polling place for the purpose of casting his ballot, or in the event the elector, having expected to be absent, is in the county of his residence on election day, the absentee ballot cast by the elector shall be void, and the elector shall notify the county clerk of the removal of the disability before six o'clock p.m. on the day following the day of election."

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Section 112.030 RSMo., 1959 Supp. is as follows:

"Application for such ballot may be made on a blank signed by the applicant, to be furnished by the county clerk or the board of election commissioners \* \* \* or may be made in writing by first class mail addressed to such officer or board signed by the said applicant,\* \* \* and if the applicant for ballot or ballots is entitled to receive same, the county clerk or the board of election commissioners, if any, or other official charged with the duty of furnishing such ballots immediately upon receipt of the printed ballots shall send in a separate envelope addressed to each absentee voter and by certified mail with return receipt or deliver in person an official ballot or ballots if more than one is to be used and voted at said election to any applicant applying in person at the office of the county clerk or the board of election commissioners."

Section 112.050 RSMo., 1959 states as follows:

"The envelope shall be sent by mail by the voter, postage prepaid, to the officer issuing the ballot, and for the ballot to be effective and eligible to be counted the envelope containing it shall bear a postmark not later than the date of the election and shall be delivered to the issuing official not later than six o'clock p.m. of the day next succeeding the day of such election, or the ballot may be delivered in person to the issuing official, who shall give his written receipt therefor, not later than six o'clock p.m. of the date of the election."

Honorable Fred A. Murdock

Section 112.120 RSMo., 1959, states as follows:

"Sections 112.010 to 112.120 shall be deemed to provide a method of voting by voters absent from their county, or prevented by illness or physical disability from going to the polls to vote, on election day. It is in addition to the method now provided by statutes in cases where the voter is present at the polling place in the county where he resides on the day of such election and to such extent is amendatory of and supplemental to existing statutes."

In answering your questions, we assume that the messenger that you refer to is the messenger or agent of the absentee voter.

In construing statutes, it is a cardinal principal that you first seek the legislative intent of the whole act and if possible, to effect that intent. (State ex rel v. Rooney, 406 S.W. 2d 1; May Department Stores Co. v. Weinstein, 395 S.W. 2d 525). Words should be given their plain and ordinary meaning (Bittker v. State Board of Registration for Healing Arts, 404 S.W. 2d 402, Johan v. Mayor, 391 S.W. 2d 864). Statutes normally directing the mode of procedure by public officers are to be held directory unless declared to be mandatory by the law itself. (Scales v. Butler, 323 S.W. 2d 25, 29. However, in Elliott v. Hogan, 315 S.W. 2d 840, 846, the St. Louis Court of Appeals has held these sections above quoted to be mandatory. We quote extensively from that decision as follows:

"In his brief contestee admits that the procedures followed in the case of the casting of 16 of the absentee ballots did not meet all of the 'technical provisions', as he describes them, of the relevant statutes, but contends that such statutes are merely directory, and not mandatory, and that being merely directory, non-compliance with the statutes was not a proper basis upon which to reject such ballots. The terms 'mandatory' and 'directory' are convenient only for the purpose of distinguishing one class of

irregularities from another, for, strictly speaking, all laws are mandatory in the sense that they are enacted to be observed and obeyed. However, adopting, for convenience, the nomenclature heretofore commonly used, it is true that in many decisions involving our election laws a distinction has been drawn between the result which followed from the violation of a statute held to be mandatory and the consequence of a breach of a statute said to be merely directory in nature. *State ex rel Woodmansee v. Ridge*, 343 Mo. 702, 123 S.W. 2d 20; *State ex rel Hay v. Flynn*; 235 Mo. App. 1003, 147 S. W. 2d 210; *State ex rel Ellis v. Brown*, 326 Mo. 627, 33 S. W. 2d 104; *State ex rel Haller v. Arnold*, 277 Mo. 474, 210 S. W. 374.

"But whether a statute is mandatory or merely directory is not always clear. It has been said that if the statute in question prescribes the result to follow from its violation, the courts will consider the provision a mandatory requirement, and enforce it. *Nance v. Kearbey*, 251 Mo. 374, 158 S. W. 629; *Gass v. Evans*, 244 Mo. 329, 149 S. W. 628; *Bowers v. Smith*, 111 Mo. 45, 20 S. W. 101, 16 L.R.A. 754. In the latter case it was said, 20 S. W. loc. cit. 105:

'If the law itself declares a specified irregularity to be fatal, the courts will follow that command, irrespective of their views of the importance of the requirement.'

"And it has been held that where the irregularity has been such as not to have interfered with a full and fair expression of the voters' choice, particularly where it is a mistake of an election official, the irregularity

should not result in the disenfranchisement of the voters. *Bowers v. Smith*, supra; *Nance v. Kearbey*, supra.

"[2] Thus no hard and fast test can be applied by which the question may be resolved. As we said in *State ex rel Hay v. Flynn*, supra, 147 S. W. 2d loc. cit. 211:

'There is no absolute test by which the question here presented may be resolved, but in passing upon the matter, the prime object is to ascertain the legislative intent from a consideration of the statute as a whole, bearing in mind its object and the consequences that would result from construing it one way or the other.'

And see *State ex rel Ellis v. Brown*, supra, and *Hehl v. Guion*, 155 Mo. 76, 55 S. W. 1024.

"With this guide in mind, we turn to a consideration of §§ 112.010 et seq RSMo 1949, V.A.M.S. concerning absentee voting. A review of those statutes reveals a comprehensive and restrictive code for the casting of absentee ballots. Other than military personnel, § 112.010 limits the right of absentee voting to only those who expect to be absent on election day from the county in which they are qualified to vote, and to those who through illness or disability expect to be prevented from personally going to the polls to vote. Section 112.020 provides that if a voter applies for an absentee ballot on the ground of illness or physical disability he shall attach to his application a certificate of illness or disability attested to by a licensed physician or duly accredited

practitioner of Christian Science; that such application, on either of the statutory grounds, must be made in person or by mail to the election official within 30 days before the election and up to 6 o'clock p.m. on the day before the election. Such application, by § 112.030, must be made on blanks to be furnished by the election official, and the latter is required to compile, keep current, and post in a conspicuous place accessible to the public, a list giving the names, addresses, and voting places of those voters to whom he issues absentee ballots, which he is required to deliver to the applicant either in person or by mail.

"Section 112.040 provides that the election official shall initial the ballot before delivering it to the voter, and shall enclose it in an unsealed envelope bearing his name, official title, and post office address, as well as having printed thereon a form of affidavit set forth in the statute. Sections 112.050 to 112.100, inclusive, contain meticulous provisions as to the oath to be administered to the absentee voter by an officer authorized to administer oaths; the marking of the ballot in his presence; the sealing of the same in the official envelope; the return of the envelope to the election official by a designated time; the preparation by him of a list of absentee voters whose ballots are returned to him; the appointment of judges to open and canvass the absentee ballots; the challenging of votes; and the secrecy, sealing and safekeeping of such ballots."



"[3,4] Applying the principles referred to in determining the legislative intent, we are of the opinion that the absentee voting statutes with respect to such requirements are mandatory. By § 112.120, the General Assembly declared that such statutes were to provide a method of voting by voters absent from their county, or prevented by illness or physical disability from going to the polls to vote, on election day; that it is in addition to the method of voting at the polling places; and that it 'to such extent is amendatory of and supplemental to existing statutes.' As said in *Straughan v. Meyers*, 268 Mo. 580, 187 S. W. 1159, the absentee voting laws were enacted 'to provide the means and machinery through which a certain class of citizens might enjoy a privilege which, under the general laws, could not be exercised.' 187 S. W. loc. cit. 1163.

"But while the Legislature has extended this special privilege to those who would otherwise be unable to vote on election day, it is readily apparent that it has provided safeguards to prevent an abuse of the privilege. The right to vote an absentee ballot is strictly limited to two statutory grounds; absences from the county on election day, and illness or physical disability."

\* \* \* \* \*

"Contestee points out that the only express statements as to the result to follow from a non-compliance with the act occurs in §112.050, in which it is provided that in order to be eligible to be counted the absentee ballot must

either be delivered to the election official by 6 o'clock p.m. of the day of the election, or be postmarked the day of the election and reach the election official the day next succeeding the election; and contends that the Legislature having thus made compliance therewith mandatory indicated that all other provisions are directory only. We think otherwise. Taking into account the purposes of the act, the nature of the safeguards provided, and the consequences which would result from non-compliance therewith, in our opinion the statutes are mandatory. It is equally as important and as obligatory that absentee ballots be issued only to those clearly entitled under the statute to receive them, and that such ballots should not be issued after the time designated in the statute, as it is that they be received by the election official before the stated time. And the result of non-compliance should be the same for all such violations."

We note that the above case was tried in 1958 and that the statute then provided that medical statements be attached. Otherwise, the statute was substantially the same. We must conclude that the statutory requirements (*supra*) are mandatory and must be strictly complied with by the elector. See also *Straughan v. Meyers*, Mo. 187 S. W. 1159, 1163.

Inasmuch as these statutes are in *pari materia*, and are to be read and construed together, with effect given to all provisions, if possible, we take the position the phrase, "in person" should be interpreted the same and harmonized throughout the entire act (*Mitchum v. Perry*, 390 S. W. 2d 600; *Bittiker v. State Board of Registration for the Healing Arts*, 404 S.W. 2d 402.)

Your question number one must therefore be answered in the negative inasmuch as under Section 112.020, the elector shall

either apply in person or by mail. See our Opinion No. 356 dated December 7, 1964, addressed to Honorable Frank Ellis (attached).

Your question number two must also be answered in the negative inasmuch as Section 112.050 requires the envelope containing the ballot "shall be sent by mail by the voter" or "the ballot may be delivered in person to the issuing official".

As used in Chapter 112, we conclude the words "may \* \* \* or" to mean "either \* \* \* or \* \* \*". So read, any ambiguity is resolved and the several sections can be read in harmony with each of its several, component parts.


#### CONCLUSION

It is the opinion of this office that:

1. The requirements of Chapter 112, RSMo as amended, on absentee balloting are mandatory.
2. The elector wishing to vote an absentee ballot under Chapter 112 must apply either by mail or in person for his ballot.
3. The elector wishing to cast his absentee ballot under Chapter 112 must either return his ballot by mail or deliver it in person to the issuing officer.

The foregoing opinion, which I hereby approve, was prepared by my Assistant Richard C. Ashby.

Yours very truly,

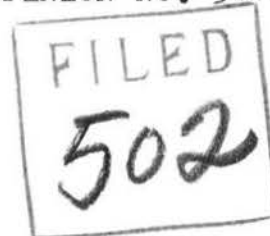
  
NORMAN H. ANDERSON  
Attorney General

DRIVERS LICENSE:  
DRIVERS LICENSE REVOCATION:  
DRIVING WHILE INTOXICATED:  
MOTOR VEHICLES:

The word "offense" used in subparagraphs (1), (2) and (3) of Section 564.440, RSMo Supp. 1965, refer only to violations of this section, the state law, and does not include convictions for driving while intoxicated in violation of a county or municipal ordinance.

December 9, 1966

OPINION NO. 502



Honorable Charles G. Hyler  
Prosecuting Attorney  
St. Francois County  
Courthouse  
Farmington, Missouri 63640

Dear Mr. Hyler:

This is in answer to your request for an opinion of this office which reads as follows:

"We have a situation where a man was convicted of driving while intoxicated in the City of Ferguson in St. Louis County, and has subsequently been convicted of driving while intoxicated in St. Francois County Magistrate Court.

"The question I have is the conviction in the Magistrate Court of St. Francois County to be taken as a second offense or a first offense under the D.W.I. Statute, taking into consideration the fact that the first conviction was in a City Court and not the Magistrate Court."

Operating a motor vehicle while intoxicated is made an offense under state law by Section 564.440, RSMo Supp. 1965, which provides in part as follows:

"No person shall operate a motor vehicle while in an intoxicated condition. Any person who violates the provisions of this section shall be deemed guilty of a misdemeanor on conviction for the first two violations thereof, and a felony on conviction for the third and subsequent violations

Honorable Charles G. Hyler

thereof, and, on conviction thereof, be punished as follows:

(1) For the first offense, by a fine of not less than one hundred dollars or by imprisonment in the county jail for a term not exceeding six months, or by both such fine and imprisonment;

(2) For the second offense, by confinement in the county jail for a term of not less than fifteen days and not exceeding one year;

(3) For the third and subsequent offenses, by confinement in the county jail for a term of not less than ninety days and not more than one year or by imprisonment by the department of corrections for a term of not less than two years and not exceeding five years;

(4) Evidence of prior convictions shall be heard and determined by the trial court, out of the hearing of the jury prior to the submission of the case to the jury, and the court shall enter its findings thereon;"

\* \* \* \* \*

(Emphasis added)

There are also municipal ordinances forbidding and punishing drunk drivers and you state in your letter that the person was convicted in the City of Ferguson under a municipal ordinance.

The question thus raised is whether the term "offense" as used in subparagraphs (1), (2) and (3) in Section 564.440, RSMo Supp. 1965, is limited to the offense proscribed by the state law only, or does it include a conviction of driving while intoxicated under a city ordinance.

It is a familiar principle of statutory construction that legislative enactments are to be construed in a manner to effectuate the intent of the General Assembly in their passage. In determining this intent, recourse may be had to the language contained in the statute itself, statutes in pari-materia, the history of the act and the mischief it was designed to remedy.

Prior to its amendment in 1961, Section 564.440, RSMo 1959, provided:

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"No person shall operate a motor vehicle while in an intoxicated condition, or when under the influence of drugs."

Sanctions for conviction thereof were set forth in Section 564.460, RSMo 1959, as follows:

"Any person who violates the provisions of section 564.440 or 564.450 shall be deemed guilty of a felony and on conviction thereof shall be punished by imprisonment in the penitentiary for a term not exceeding five years or by confinement in the county jail for a term not exceeding one year, or by a fine not exceeding one hundred dollars, or by both such fine and imprisonment."

By the language that the penal provisions of Section 564.460 applied only to those convicted of violating the state law, the legislature clearly indicated that such provisions were not applicable to violations of municipal or county ordinances.

The enacting clause of the 1963 act, amending the law to its present form, stated that by the new act, Sections 564.440 and 564.460, RSMo 1959, were repealed and Sections 564.440, 564.441, 564.445 and 564.446, were enacted in their place. Laws 1963, p. 686. Thus, the legislative history of the act supports the conclusion that the punishment provided therein was intended to cover convictions under the state law only.

This conclusion is further supported by considering the language of the section as now written. The first paragraph delineates the offense and then provides that "on conviction thereof, be punished as follows". The use of the word "thereof" strongly indicates that the following punishments were for conviction of the "offense" previously described.

In addition, the first paragraph provides that "any person who violates the provisions of this section shall be deemed guilty of a misdemeanor on conviction for the first two convictions thereof, and a felony on conviction for the third and subsequent violations thereof". The punishments following conform to the provisions relating to violations of "this section" in that the first two call for punishments consistent with that of a misdemeanor conviction and the third is consistent with a graded felony conviction.



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It has become well-established that penal statutes must be strictly construed against the state and liberally in favor of the defendant. State v. Chadeayne, Mo. Sup., 323 S.W.2d 680; State v. Getty, Mo. Sup., 273 S.W.2d 170; City of St. Louis v. Brune Management Co., Mo. App., 391 S.W.2d 943. The present wording of the statute as well as its legislative history indicates an intent by the legislature that the increasing severity of the punishment apply only to convictions of the "offense" of operating a motor vehicle while in an intoxicated condition in violation of the state law, Section 564.440, RSMo Supp. 1965.

#### CONCLUSION

It is our opinion that the word "offense" used in subparagraphs (1), (2) and (3) of Section 564.440, RSMo Supp. 1965, refers only to violations of this section, the state law, and does not include convictions for driving while intoxicated in violation of a county or municipal ordinance.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John H. Denman.

Very truly yours

  
NORMAN H. ANDERSON  
Attorney General

November 21, 1966

OPINION NO. 511  
Answered by Letter-Mansur

Honorable Harry L. Porter  
Prosecuting Attorney  
Linn County  
Linneus, Missouri



Dear Mr. Porter:

Recently you requested an opinion from this office as to the disposition of a fee amounting to ten dollars which you received from Chariton County for prosecuting a criminal case in that county on a change of venue from Linn County.

We are enclosing herewith an opinion issued by this office on January 4, 1951, to R. G. Kirkland, Prosecuting Attorney, Clay County, Missouri, which held that the prosecuting attorney of Clay County is entitled to the fee for prosecuting a criminal case on a change of venue to another county.

It is our opinion that under Section 56.340, RSMo, the prosecuting attorney's fee received in a change of venue case must be remitted to the county from which the change of venue was taken, in this case Linn County, the same as all other prosecuting attorney's fees are remitted.

If you have any further questions, please advise.

Very truly yours,

NORMAN H. ANDERSON  
Attorney General

MM:cw

Enclosure (opinion): Issued 1/4/51, to Kirkland

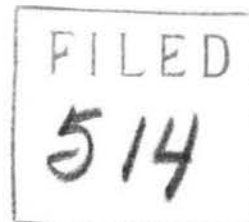
INCOMPATIBILITY OF OFFICES:  
PROSECUTING ATTORNEY:  
PUBLIC ADMINISTRATOR:

The offices of the prosecuting attorney  
and the public administrator are in-  
compatible.

OPINION NO. 514

November 23, 1966

Honorable Don W. Owensby  
Prosecuting Attorney  
Buffalo, Missouri 65622



Dear Mr. Owensby:

This opinion on the question whether the elective offices of public administrator and prosecuting attorney of a third class county may be held at the same time by one person and are incompatible is written to respond to your recent request.

Compatibility and incompatibility of offices is a common-law doctrine which was discussed in the leading Missouri case of *State ex rel. Walker v. Bus*, 135 Mo. 325, 1.c. 338, where the court said:

"V. The remaining inquiry is whether the duties of the office of deputy sheriff and those of school director are so inconsistent and incompatible as to render it improper that respondent should hold both at the same time. At common law the only limit to the number of offices one person might hold was that they should be compatible and consistent. The incompatibility does not consist in a physical inability of one person to discharge the duties of the two offices, but there must be some inconsistency in the functions of the two; some conflict in the duties required of the officers, as where one has some supervision of the other, is required to deal with, control, or assist him.

"It was said by Judge Folger in *People ex rel. v. Green*, 58 N. Y. loc.cit. 304: 'Where one office is not subordinate to the other, nor the relations of the one to the other such as are inconsistent and repugnant, there is not that incompatibility from which the law declares that the acceptance of the one is the vacation of the other. The force of the word,

Honorable Don W. Owensby

in its application to this matter is, that from the nature and relations to each other, of the two places, they ought not to be held by the same person, from the contrariety and antagonism which would result in the attempt by one person to faithfully and impartially discharge the duties of one, toward the incumbent of the other. Thus, a man may not be landlord and tenant of the same premises. He may be landlord of one farm and tenant of another, though he may not at the same hour be able to do the duty of each relation. The offices must subordinate, one the other, and they must, per se, have the right to interfere, one with the other, before they are incompatible at common law.'"

Where incompatibility of offices exists, the courts of this state have held that the office holders may not hold such offices. This is a common law limitation prohibiting the holding of two offices which are incompatible. Further inhibitions must be expressed either by the Constitution or in the Statutes (we find none here expressed). (Bruce v. St. Louis, 217 S.W.2d 744, 748; State ex rel. Gragg v. Barrett et al., 180 S.W.2d 730).

Examination of the statutes with respect to the duties of these two offices will afford an example of incompatibility, particularly, in the field of inheritance tax.

It is the duty of the public administrator in certain cases (defined by Section 473.743 and 473.747 RSMo., 1959) to take charge of certain decendant's estates. Under Section 473.750 RSMo., 1959, the public administrator exercises the same powers and is subject to the same duties etc., that are enjoined upon executors and administrators, guardians and curators by Chapters 472 to 475 RSMo., 1959, as may be applicable. This includes, among other things, certain obligations and duties with respect to inheritance taxes. Section 145.120 RSMo., 1950, provides that the executor or administrator has a duty to pay the inheritance tax. Section 145.130 RSMo., 1955, imposes a personal liability upon the administrator or executor for such taxes until they are paid.

By Section 145.270 and 145.280 RSMo., 1959, the Prosecuting Attorney has a duty imposed upon him to represent the state in inheritance tax matters and to institute suit for collection thereof when such taxes are past due.

Honorable Don W. Owensby

It is obvious that there is conflict existing where the public administrator is delinquent in paying the inheritance tax due on a decendant estate and where the same person as prosecuting attorney files a suit against himself as the public administrator to collect the inheritance tax on a basis of a personal liability of the public administrator.

Perhaps more important than the example on incompatibility given above is the responsibility that the prosecuting attorney has to initiate quo warranto pursuant to Section 531.010 RSMo., 1959 when any person shall usurp, intrude into or unlawfully hold or execute any office as directed by Section 531.020 RSMo., 1959. The prosecuting attorney has a duty in the public interest to see that public officers faithfully and honestly perform their duties. If the prosecuting attorney held another county office, he would be compelled to sit in judgment on himself. Obviously, this posture is plainly incompatible and should not be countenanced. See also Section 106.220 and 106.230 RSMo, 1959, respecting the duty of the Prosecuting Attorney with relation to other county and city officers.


For this reason, we conclude that the office of public administrator and the prosecuting attorney of the same county are incompatible. This is true regardless of the class of the counties.

#### CONCLUSION

It is the opinion of this office that the offices of public administrator and prosecuting attorney of the same county are incompatible and that the same person may not therefore hold both offices.

The foregoing opinion which I hereby approve was prepared by my assistant, Richard C. Ashby.

Yours very truly,

  
NORMAN H. ANDERSON  
Attorney General

FEDERAL-STATE AGREEMENTS:

Authority of the Office of State and Regional Planning and Community Development to receive Federal grants and use for purpose of conducting study of constitutional and statutory provisions in connection with state, regional and local planning.

Opinion No. 517  
Answered by Letter (DeFeo)

December 8, 1966

Office of State and Regional Planning  
and Community Development  
Attention: Mr. Peter W. Salsich, Jr.  
Jefferson Building  
Jefferson City, Missouri



Gentlemen:

This letter is in response to your request for our official opinion as to the authority of the Office of State and Regional Planning and Community Development to receive and utilize a grant from the United States under the provisions of Section 701B of the Housing Act of 1964, as amended by the Demonstration Cities of the Metropolitan Development Act of 1966. You inform us that this grant will be used to conduct a comprehensive study of constitutional and statutory provisions affecting local governments in Missouri; that readily available and organized information about existing laws is a necessary resource in the preparation of state, regional and local plans; and further urban development planning necessarily includes the means and modes of implementing proposed development which in turn depends upon appropriate enabling legislation.

Section 251.050(2) V.A.M.S., August 1966, Cum. Pamphlet, Section 5(2) Senate Bill 14, Second Extraordinary Session, 73rd General Assembly (1966), expressly authorizes the Office to contract for, receive, and utilize grants from the Federal Government.

It is the opinion of this office that the Office of State and Regional Planning and Community Development has the authority to contract for and receive grants of the Federal Government and to utilize such grants for the purpose of conducting the study of constitutional and statutory provisions in connection with comprehensive planning for the state, its regions, and local governmental units.

Yours very truly,

---

NORMAN H. ANDERSON  
Attorney General



QUALIFICATION OF VOTERS: A voter, upon suspension of the imposition  
VOTERS: of a sentence, is not disqualified from  
CONVICTION OF FELONY: registering and/or voting, if otherwise  
SENTENCES: qualified.

OPINION NO. 518

December 6, 1966

Board of Election Commissioners  
of Kansas City, Missouri  
1331 Locust Street  
Kansas City, Missouri 64106

Attention: Mr. Fred A. Murdock

Gentlemen:



This opinion responds to your request whether the judgment and order of probation entered February 19, 1965, by the United States District Court for the Western District of Missouri in the case of U. S. v. Canaday is a conviction of a felony within the meaning of Section 111.060; 117.040 and 117.400 RSMo. 1959.

The judgment of the court in this case reads as follows:

"It is adjudged that the defendant is guilty as charged and convicted.

"It is adjudged that imposition of sentence of imprisonment is suspended and the defendant is placed on probation for a period of three (3) years on each of counts 3 and 4, to be served concurrently with each other, under the general conditions of probation adopted by the Court, which will be communicated to the defendant orally and in writing by the U.S. Probation Office. No costs assessed."

A brief review of the pertinent constitutional and statutory provisions is necessary in order to lay a basic understanding for the resolution of this question. The sections involved in pertinent parts are: Article VIII, Section 2, Missouri Constitution 1945:

Board of Election Commissioners  
of Kansas City, Missouri

"All citizens of the United States, over the age of twenty-one who have resided in this state one year, and in the county, city or town sixty days next preceding the election at which they offer to vote, are entitled to vote at all elections by the people.

\* \* \* \* \*

"No person while confined in any public prison shall be entitled to vote, and persons convicted of felony, or crime connected with the exercise of the right of suffrage may be excluded by law from voting."

Section 111.060 RSMo, 1959 reads in pertinent parts as follows:

"All citizens of the United States, including residents of soldiers' and sailors' homes, over the age of twenty-one years who have resided in this state one year, and the county, city or town sixty days immediately preceding the election at which they offer to vote, and no other person shall be entitled to vote at all elections by the people.  
\* \* \* nor shall any person convicted of a felony, or of a misdemeanor connected with the exercise of the right of suffrage, be permitted to vote at any election unless he shall have been granted a full pardon; \* \* \*"

Section 117.040, RSMo 1959, reads in pertinent parts as follows:

"Every citizen of the United States over the age of twenty-one years, including occupants of soldiers' and sailors' homes, who has resided in the state one year next preceding the election at which he offers to vote, and during the last sixty days of the time shall have resided in the city

Board of Election Commissioners  
of Kansas City, Missouri

where such election is held, who has not been convicted of a felony, \* \* \* shall be entitled to vote at such election for all officers, state or municipal, made elective by the people, or at other elections held in pursuance of the laws of the state. \* \* \*"

Section 117.400, RSMo 1959, reads as follows:

"It shall be the duty of the board upon receipt of the reports of deceased persons and persons convicted of felony or of a crime connected with the exercise of the right of suffrage to forthwith cancel the registration of all such persons, but such board shall make a notation on the registration record showing the date and cause of such cancellation."

If, indeed, this is a conviction under the state law of Missouri, the elector would be disqualified, Cf. State v. Sartorius, 175 S.W.2d 787.

The issues are succinctly stated by the Court of Appeals of Maryland (1949) in the case of Hunter v. State, 69 Atlantic 2d 505, 509 where the court said:

"The appellant also contends that there had been no prior conviction, because in Case No. 19 no sentence had been imposed and that the word 'conviction' includes both verdict and sentence. Investigation into this question discloses a divergence of opinion throughout the country on the subject. In this State, there is one case which discusses the meaning of the word, Francis v. Weaver, 76 Md. 457, 25 A.413, 415. In that case the court was not considering the testimony of a conviction to impeach a witness, but the meaning of the word as used in a statute. It said 'The phraseology of the statute (1812 C.78, §26, November Session), is somewhat misleading, and the use made of

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the word 'convicted' is largely the cause of the trouble. 'In common parlance, no doubt it (convicted) is taken to mean the verdict at the time of trial, but in strict legal sense it is used to denote the judgment of the court.' Tindal, C.J., in Burgess v. Boctefeur, \* \* \* 7 Man. & G. 504; Smith v. Com., 14 Serg. & R. [Pa.] 69; Blaufus v. People, 69 N.Y. 107, 25 Am. Rep. 148. The word 'conviction' is undoubtedly verbum aequivocum, but we think the meaning given to it by Chief Justice Tindal is the one proper to be applied here.' The majority of the decisions throughout the country seem to agree that conviction includes not only the verdict of a jury, but the imposition of a sentence or judgment. Such cases are State v. Burnett, 144 Wash. 598, 258 P.484; Martin v. State, 30 Okl.Cr. 49, 234 P.795; Commonwealth ex rel Arnold v. Ashe, 156 Pa. Super, 451, 40 A.2d 875; Broughton v. State, 148 Tex Cr. R. 445, 188 S.W.2d 393; Thomas v. U.S., 74 App.D.C. 167, 121 F.2d 905; Smith v. State, 75 Fla. 468, 78 So. 530; State v. Spurr, 100 W.Va. 121, 130 S.E. 81; Crawford v. U.S., 59 App.D.C. 356, 41 F.2d 979; State v. Roybal, 33 N.M. 540, 273 P.919; In re Ringnalda, D.C.Cal., 48 F.Supp., 975; City of Boston v. Santosuosso, 307 Mass. 302, 30 N.E.2d 278; Campbell v. U.S., D.C.Cir., 176 F.2d 45."

It is interesting to note that the Federal rule is stated by the U. S. District Court (S. D. California in 1943) in the case of In re Ringnalda 48 F.Supp., 975, 977, where the court said:

"This conclusion accords with the general view, which obtains also in federal courts, that when we speak of a 'conviction' from which disabilities flow, we refer to a conviction followed by the imposition of a sentence, which is the judgment in a criminal case. And where imposition of

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the sentence is stayed, there is no final judgment. See: *Berman v. United States*, 1937, 302 U.S.211, 58 S.Ct. 164, 82 L.Ed. 204; *Crawford v. United States*, 1930, 59 App.D.C. 356, 41 F.2d 979; *In re Phillips*, 1941, 17 Cal.2d 55, 58, 109 P.2d 344, 132 A.L.R. 644. Thus courts have held that before there can be a denial of the right to vote (*People v. Fabian*, 1908, 192 N.Y. 443, 85 N.E. 672, 18 L.R.A., N.S. 684, 27 Am. St. Rep. 917, 15 Ann.Cas.100), deprivation of a license to practice a profession (*Donnell v. Board of Registration of Medicine*, 1930, 128 Me. 523, 149 A.153), or impeachment of a witness (*People v. Mackay*, supra, *Crawford v. United States*, supra, *Dial v. Commonwealth*, 1911, 142 Ky. 32, 133 S.W. 976; *Attorney General v. Pelletier*, 1928, 240 Mass. 264, 134 N.E. 407; *State v. Roybal*, 1928, 33 N.M. 540, 273 P.919; *State v. Spurr*, 1925, 100 W.Va. 121, 130 S.E.81) or other penalties, (*State v. Pishner*, 1914, 73 W.Va. 744, 81 S.E. 1046, 52 L.R.A. N.S., 369; *State v. Savage*, 1920, 86 W.Va. 655; 104 S.E. 153; *State ex rel. Blake v. Levi*, 1930, 109 W.Va. 277, 153 S.E. 587) by reason of conviction of an offense, the conviction or plea of guilty must be followed by the actual imposition of a sentence, i.e., final judgment. See note, 12 So.Cal.Law Rev. 1939, 201. So that, when the Superior Court failed to impose any sentence in this case, and, after the expiration of the probationary period caused the verdict of 'guilty' to be changed to one of 'not guilty', and dismissed the proceeding, there was no conviction of an offense involving moral turpitude affecting the character of the petitioner, upon which the Government can now ground its objection to admission to citizenship. See *Suspension of Hickman*, 1941, 18 Cal.2d 71, 113 P.2d 1; *Sherry v. Ingels*, 1939, 34 Cal.App.2d 632, 633, 94 P.2d 77."

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The Kansas City Court of Appeals in Meyer v. Real Estate Commission, 183 S.W.2d 342, said:

"The statutes providing for suspension of sentence and probation are said to be remedial and hence are to be liberally construed.' 24 C.J.S., Criminal Law, § 1571, p. 55.

\* \* \* \* \*

"The evidence shows that the business of plaintiff herein is that of a real estate broker, and it would appear that to deprive him of his occupation might well shut the door of opportunity against him and impede, if not prevent, his restoration to society as a good social risk. In cases where the defendant is put upon probation the federal court, no doubt, finds that there are circumstances surrounding the life of the defendant to lead it to believe that he will be a good risk for reformation. If this is true it appears to us that his future should not be clouded by depriving him of his occupation. Consequently, having in mind the beneficent purposes of the Federal Act we are of the opinion that it was not intended by Congress that a suspension of imposition of sentence and placing of defendant on probation should be construed to be a final judgment of conviction in the case such as to work injury to him in another proceeding. It might be further observed that while the probationary period is running in these cases it may appear to the federal court that the best interests of the public and the defendant would be served by modifying the conditions of the probation, as for instance, changing the period, *Scalia v. United States*, 1 Cir., 62 F.2d 220, or defendant may be discharged altogether from supervision and the proceedings terminated against him as provided by sections 724, 725 of the Federal Statute, or, the court may see fit, in order to remove the stain, as far as possible, of



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the record made in the case against plaintiff, to dismiss the proceedings against him entirely.

"Since such statutes (providing for the suspension of sentence and placing accused on probation after a plea or verdict of guilty) look to the reformation and not to a final goal of punishment, where the object of probation seems to the court to have been accomplished in such a way as not to require the punishment of accused, the court may dispose of the case finally by a dismissal thereof, even though the statute does not specifically authorize such action.' 24 C.J.S., Criminal Law, § 1571, p. 53; 16 C.J. p. 1289. See, also, Marks v. Wentworth, 199 Mass. 44, 85 N.E. 81.

"As long as it is within the province of the federal court to dismiss the criminal proceedings against the plaintiff herein, it can hardly be said that there has been a final judgment of conviction.

\* \* \* \* \*

"However, where the reference is to the ascertainment of guilt in another proceeding (as here), and the question as to its bearing upon the status or rights of the individual in a subsequent case is under consideration, a broader meaning is to be attached to the word 'conviction', and a person is not deemed to have been convicted unless it is shown that a judgment is pronounced upon a verdict or plea of guilty. \* \* \*"

Accordingly, this office concludes that the elector in this case, under the judgment of the court, where the imposition of sentence was suspended, has not been convicted within the meaning of the statutes so as to be disqualified from registering and voting, if otherwise qualified.


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CONCLUSION

It is the conclusion of this office that where the imposition of sentence is suspended, the elector is not disqualified under the statutes from registering and/or voting, if otherwise qualified.

The foregoing opinion which I hereby approve was prepared by my assistant, Richard C. Ashby.

Yours very truly,

  
NORMAN H. ANDERSON  
Attorney General

December 8, 1966

Honorable Donald L. Gann ✓  
State Representative  
Christian County  
Ozark , Missouri

FILED  
522

Dear Representative Gann:

This is in response to your opinion request dated November 14, 1966, requesting an opinion on the legality of a nursing home district election. We have examined carefully the material you have furnished and in addition we have just obtained a copy of the opinion of Honorable Mayte Hardie, Prosecuting Attorney of Christian County, dated November 5, 1966, to the County Court.

No information has been brought to our attention to doubt the correctness of Prosecuting Attorney Hardie's opinion. We agree with that opinion. In the event there is a desire to pursue further the question of legality the proper forum for doing so would be in an appropriate action in Court.

Yours very truly,

NORMAN H. ANDERSON  
Attorney General

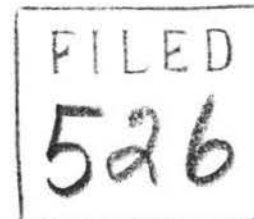
SHERIFFS:  
HIGHWAY PATROL:  
ARREST:  
BAIL:

(1) The sheriff under Supreme Court Rule 37.485 may admit to bail a person arrested for a motor vehicle violation pursuant to the bail schedule when the courts are not open. (2) The sheriff has a duty to receive into custody persons arrested without warrant by the Highway Patrol for a motor vehicle violation.

OPINION NO. 526

December 22, 1966

Honorable Richard J. Blanck  
Prosecuting Attorney of  
Cooper County  
Boonville, Missouri



Dear Mr. Blanck:

Your inquiry requesting an official opinion of this office concerning the authority of a sheriff to accept bail from a person arrested by a highway patrolman, when the Magistrate Court is not open and no uniform traffic ticket has been filed in the Magistrate Court and secondly, whether a person can be lawfully confined in the county jail when arrested by a patrolman without warrant is considered herein.

Your first question is answered by our Opinion No. 42, dated November 8, 1961, addressed to the Honorable Fred L. Howard. We concluded therein that under Supreme Court Rule 37.485, the sheriff of the county in which the offense was committed is authorized to set and take the amount of bail which shall not be less than \$16.00 or more than \$200.00 in accordance with the bail schedule as provided in the above Rule.

Your second question is answered in the affirmative and is based upon several statutes which are set out in pertinent parts as follows:

Section 221.020, RSMo., 1959 is as follows:

"The sheriff of each county in this state shall have the custody, rule, keeping and charge of the jail within his county, and of all the prisoners in such jail, and may appoint a jailer under him, for whose conduct he shall be responsible."

Honorable Richard J. Blank

Section 221.040 RSMo., 1959 is as follows:

"It shall be the duty of the sheriff and jailer to receive, from constables and other officers, all persons who shall be apprehended by such constable or other officers, for offenses against this state, or who shall be committed to such jail by any competent authority; and if any sheriff or jailer shall refuse to receive any such person or persons, he shall be adjudged guilty of a misdemeanor, and on conviction shall be fined in the discretion of the court."

Section 43.190 RSMo., 1959 is as follows:

"The members of the patrol \* \* \* \* are hereby declared to be officers of the state of Missouri. \* \* \* \* The members of the patrol shall have authority to arrest without writ, rule, order or process any person detected by him in the act of violating any law of this state."

\* \* \* \* \*

Section 43.195 RSMo., 1959 Supp. is as follows:

"Any member of the Missouri state highway patrol may arrest on view, and without a warrant, any person he sees violating or whom he has reasonable grounds to believe has violated any law of this state relating to the operation of motor vehicles."

Considering the plain and ordinary meaning of the words of the statute as we are directed to do by the Supreme Court of Missouri (State v. Neill, Mo., 397 S.W.2d 666, 669), we conclude it is the duty of the sheriff to receive into custody such persons, so arrested on view without warrant, but under Section 544.170 RSMo., 1959, they may not be held without warrant for more than twenty hours. Of course, if the court is open, Section 43.210 RSMo., 1959 requires the highway patrolman to take the person arrested "forthwith \* \* \* before the court or magistrate \* \* \* to be dealt with according to law."

Honorable Richard J. Blanck

CONCLUSION

It is the opinion of this office that:

1. Pursuant to Supreme Court Rule 37.485, when an arrest is made without a warrant for a misdemeanor involving the operation of a motor vehicle, the sheriff of the county in which the offense is committed is authorized to set and take the amount of bail when the courts are not open which shall not be less than \$16.00 or more than \$200.00 in accordance with the bail schedule.

2. The sheriff has the duty to receive into custody any prisoner arrested by a highway patrolman without a warrant for a law-violation involving the operation of a motor vehicle.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Richard C. Ashby.

Yours very truly,

  
NORMAN H. ANDERSON  
Attorney General



December 9, 1966

Honorable Dewey L. Hankins  
State Representative  
Barry County  
Route 1  
Cassville, Missouri



Dear Representative Hankins:

This is in response to your opinion request dated November 22, 1966, requesting an opinion on the legality of a nursing home district election in Christian County.

We have just received a copy of an opinion rendered by Honorable Mate Hardie, Prosecuting Attorney of Christian County, dated November 5, 1966, to the County Court. No facts have been brought to our attention to doubt the conclusions raised by Prosecuting Attorney Hardie. We believe the conclusions of Prosecuting Attorney Hardie are correct. In the event there is a desire to pursue further the question of legality the proper forum for doing so would be in an appropriate action in Court.

Yours very truly,

NORMAN H. ANDERSON  
Attorney General

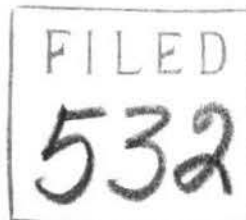
COUNTY COURT:  
COUNTY COURT JUDGES:  
ELECTIONS:  
TIE VOTES:

- (1) Section 49.040 RSMo 1959 is unconstitutional. (2) Section 111.760 is applicable to case where there is a tie vote for candidates for County Court Judge and a special election called.

December 8, 1966

OPINION NO. 532

Honorable George Scott  
Prosecuting Attorney  
Butler County  
Poplar Bluff, Missouri 63901



Dear Mr. Scott:

This is in response to your request for an opinion which reads as follows:

"This is to advise that at the General Election held in Butler County, Missouri, there is a tie vote for the candidates for the office of Judge County Court Western District of Butler County Missouri, each candidate receiving a total vote of 788, namely

Ralph D. Shelton, Democrat  
George M. Morrow, Republican

Please furnish me with your opinion immediately what method to use to declare the elected officer in this contest. Advise on Missouri Law under Section 111.760, also Section 49.040 of Vernon's Annotated Missouri Statutes."

Honorable George Scott

Section 49.040, RSMo 1959, provides as follows:

"All elections of judges of the county court under this chapter shall be certified to the clerks of the county courts of the counties wherein such elections shall be held; and in case of a tie between two or more persons, the same shall be determined by the sheriff of the proper county."

Section 111.760, RSMo 1959, provides as follows:

"If there shall be a tie of the votes given for any two of the candidates, except in cases otherwise provided by law, the clerk and his assistants appointed pursuant to section 111.710 casting up the number of votes, or a majority of them, shall issue their order to the sheriff of the county where the same may occur, directing him to issue his proclamation for holding an election agreeably to the provisions of this chapter; and in all cases of such special election, the clerk and assistants, or a majority of them, when they issue the order to the sheriff, shall, in such order, state the day on which such election shall be held, giving reasonable time for the same to be promulgated."

The general law on tie votes is stated in 29 C.J.S., Section 244, Page 678, as follows:

"Where the vote results in a tie, and no provision is made by law for determining who shall be declared elected in such case, there is no election. That is where two candidates receive the same number of votes, and there is no provision of law for determining which shall be declared elected, there is no choice or choosing and consequently no election; \* \* \*"

26 Am. Jr. 2nd Section 315, Page 140, states the rule:

"Where rival candidates for an office receive an equal number of votes, neither is elected. \* \* \*"

"In the absence of statutory authority, it is not permissible for the election officers to determine by lot which candidate shall be declared elected, nor can the candidates by agreement undertake between themselves to settle the question by lot or otherwise. In a number of jurisdictions, how-

Honorable George Scott

ever, provision is made for the settling of a tie vote by the drawing or casting of lots, and in some cases provision is made for the holding of a second election where the first results in a tie. \* \* \*

The general rule appears to be that in the absence of a statute, where an election of an officer results in a tie vote, no one is elected. This rule seems to be approved in Missouri in State ex rel Speck v. Geiger, 65 Mo. 306, 310, where the Court said:

"\* \* \*Both parties concur in regarding the result of the regular election in November 1874, as a failure to elect, and we will so consider it. \* \* \*

Article VI, Section 7, Constitution, provides as follows:

"In each county not framing and adopting its own charter or adopting an alternative form of county government, there shall be elected a county court of three members which shall manage all county business as prescribed by law, and keep an accurate record of its proceedings. The voters of any county may reduce the number of members to one or two as provided by law." (Emphasis added)

Article VIII, Section 3, of the Constitution, provides:

"All elections by the people shall be by ballot or by any mechanical method prescribed by law. \* \* \*

Section 49.020, RSMo 1959, provides:

"At the general election in the year 1880, and every two years thereafter, the qualified voters of each of said districts shall elect a county court judge, who shall hold his office for a term of two years and until his successor is duly elected and qualified; and at the general election in the year 1882, and every four years thereafter, the presiding judge

Honorable George Scott

of said court shall be elected by the qualified voters of the county at large, who shall hold his office for the term of four years and until his successor is duly elected and qualified. Each judge elected under the provisions of this chapter shall enter upon the duties of his office on the first day of January next after his election."  
(Emphasis added)

Turning to a consideration of the statutes, Section 49.040 purportedly authorizes the sheriff to choose or decide which one of the candidates who received the same number of votes as the other should be considered elected. The Supreme Court in *State ex rel Crow v. Kramer*, 150 Mo. 89, 51 S.W. 716, held that a statute which authorized the County Court to decide in cases of a tie vote for Justice of the Peace was unconstitutional. Section 7, Article VI, Constitution, requires the County Judges to be "elected" and Section 3, Article VIII, Constitution, requires all "elections" to be by ballot. Certainly the appointment of a County Judge by the Sheriff does not comply with the mandate of the Constitution for an "election". We therefore must conclude that Section 49.040 respecting the determination by the Sheriff in the case of a tie vote for County Judge is unconstitutional and not effective. Moreover, the idea of delegating the selection of a County Judge to the sheriff deprives the electorate of making the choice. Only the electorate has the right to choose or "elect" a County Judge.

The provisions of Section 111.760, RSMo 1959, place the matter where it properly belongs, that is in the hands of the electorate. It is therefore our view that the County Clerk and his assistants as provided by said section, should comply with the provisions of Section 111.760 and issue their order to the sheriff of the county directing him to issue his proclamation for holding a new election for the office of Judge of the County Court, Western District, as provided in said section.

#### CONCLUSION

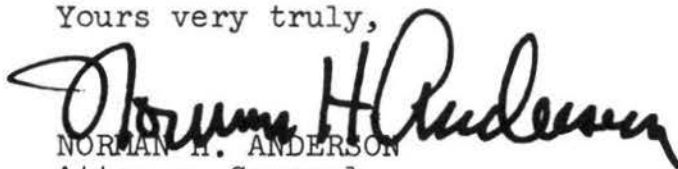
It is the opinion of this office (1) That Section 49.040 RSMo 1959, providing for the determination of the winner of an election for County Judge in case of a tie vote is unconstitutional.

Honorable George Scott

(2) That Section 111.760, RSMo 1959, is applicable in the case where there is a tie vote for candidates for office of Judge of the County Court and the clerk and his assistants should issue their order to the sheriff directing him to issue his proclamation for holding an election for the purpose of electing a Judge of the County Court.

The foregoing opinion, which I hereby approve, was prepared by my Assistant J. Gordon Siddens.

Yours very truly,



NORMAN H. ANDERSON  
Attorney General